

RECORD OF TRIAL

COVER SHEET

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

OMAR AHMED KHADR

ALSO KNOWN AS:

**AKHBAR FARHAD
AKHBAR FARNAD**

No. 050008

VOLUME VII OF ____ TOTAL VOLUMES

**1ST VOLUME OF TRANSCRIPT
JANUARY 11 & 12, 2006 SESSIONS
(REDACTED VERSION)**

United States v. Omar Ahmed Khadr, NO. 050008

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

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| II* | Supreme Court Decisions: <i>Rasul v. Bush</i>, 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i>, 339 U.S. 763 (1950); <i>In re Yamashita</i>, 327 U.S. 1 (1946); <i>Ex Parte Quirin</i>, 317 U.S. 1 (1942); <i>Ex Parte Milligan</i>, 71 U.S. 2 (1866) |
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* Interim volume numbers. Final numbers to be added when trial is completed.

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1 The Commissions Hearing was called to order at 1530,
2 11 January 2006.

3
4 [Throughout this transcript, Major [REDACTED] U.S.
5 Marine Corps will be referred to as the Prosecutor or
6 PROS. Lieutenant [REDACTED] U.S. Navy, will be
7 referred to as the Assistant Prosecutor or APROS.
8 Captain John Merriam, U.S. Army, will be referred to as
9 the Detailed Defense Counsel or DC. Professor Muneer
10 Ahmad will be referred to as Civilian Defense Counsel or
11 CDC.]

12
13 **Presiding Officer:** This military Commission will come to
14 order. Prosecutor?

15
16 **PROS:** Sir, this military Commission is appointed by
17 Appointing Order 05-0004, dated 23 November
18 2005. Copies of the appointing order have been
19 furnished to the Presiding Officer, counsel, and
20 the accused. And they have been marked as
21 Review Exhibit 6 and attached to the record.

22
23 The Presidential determination that the accused
24 may be subject to trial by military Commission

1 has been marked as Review Exhibit 3 and has been
2 previously shown to the defense.

3
4 The charges have been marked as Review Exhibit 4
5 and have been properly approved by the
6 Appointing Authority and referred to the
7 Commission for trial. The approval of the
8 charges and the referral to this Commission have
9 been marked as Review Exhibits 5 and 7
10 respectively.

11
12 The prosecution caused a copy of the charges in
13 English to be served on the accused on 30
14 November 2005. A copy of the charges have been
15 translated into Arabic and are attached to the
16 record as Review Exhibit 42.

17
18 The Prosecution is ready to proceed in the
19 Commission trial of the *United States versus*
20 *Omar Khadr*. The accused and the following
21 personnel detailed to this Commission are
22 present:

23
24 **Colonel Chester, the Presiding Officer;**

1 myself, Major [REDACTED] the lead
2 Prosecutor;
3 Lieutenant [REDACTED] the Assistant
4 Prosecutor;
5 Captain John Merriam, the Detailed Defense
6 counsel;
7 And Mr. Muneer Ahmad, the Civilian Defense
8 Counsel;
9 Lieutenant [REDACTED] has also been
10 detailed as an Assistant Prosecutor and has
11 been excused from this session by the detailing
12 authority.

13
14 A court reporter has been detailed for this
15 Commission, and has previously been sworn.
16 Security personnel have been detailed for this
17 Commission and have also been previously sworn.

18
19 **Presiding Officer:** All right. I've been designated the
20 Presiding Officer for this military Commission
21 by the Appointing Authority, and I have been
22 previously sworn. That appointment is marked as
23 RE 6.

Prosecutor, please state by whom you were detailed and what your legal qualifications and status as to oath are.

PROS: Yes, sir. All members of the prosecution have been detailed to this military Commission by the Chief Prosecutor. All members of the prosecution are qualified under Military Commission Order Number 1 Paragraph 4(b) and we have been previously sworn.

No member of the prosecution has acted in any manner which might tend to disqualify us in this proceeding. The detailing document has been marked as Review Exhibit Number 8.

Presiding Officer: Captain Merriam, would you please state your legal qualifications, status as to oath, and by whom you were detailed.

DC: Yes, sir. I have been detailed to this military Commission by the Chief Defense Counsel. I am Qualified under Military Commission Order Number 1, Paragraph 4(c), and I have previously been

1 sworn. I have not acted in any manner that
2 might tend to disqualify me in this proceeding.
3 The document detailing counsel has been marked
4 as Review Exhibit 9.

5
6 **Presiding Officer:** Thank you. Mr. Ahmad, could you
7 please state your legal qualifications, please,
8 and your status as to oath.

9
10 **CDC:** Yes, sir. I am a civilian counsel who has been
11 determined to be qualified for membership in the
12 pool of qualified civilian defense counsel in
13 accordance with Section 4(c)(3) of Military
14 Commission Order Number 1. I have transmitted
15 my notice of appearance through the Chief
16 Defense Counsel. I have signed the civilian
17 counsel agreement to practice before military
18 commissions and I have not acted in a manner
19 that may tend to disqualify me to practice in
20 this proceeding. I have not been sworn. My
21 notice of appearance including the qualification
22 determination has been marked as Review
23 Exhibit 11.

1 **Presiding Officer:** All right, you say you have not been
2 sworn?

3
4 **CDC:** I have not yet, sir.

5
6 **Presiding Officer:** All, right. You will be sworn at this
7 time.

8
9 *The Civilian Defense Counsel was sworn.*

10
11 **Presiding Officer:** Captain Merriam, are there any other
12 defense counsel detailed or assigned to this
13 case at this time?

14
15 **DC:** Yes, sir. There is one other defense counsel,
16 Civilian Defense Counsel, detailed to the case,
17 Professor Richard Wilson. He is not currently
18 present, sir, and has not entered an appearance
19 in this matter.

20
21 **Presiding Officer:** All right. Thank you.

22
23 What I want to do at this point is take up a
24 matter of an 8-5 Conference that was held. At

1 that conference present were Major [REDACTED]
2 the trial counsel -- or rather, the prosecutor
3 in this case; the Detailed Defense Counsel,
4 Captain Merriam; Civilian Defense Counsel, Mr.
5 Ahmad. Also present was the Assistant to the
6 Presiding Officer, Mr. Hodges; and, of course,
7 myself. That occurred on 10 January 2006.
8 During that conference one of the issues that we
9 discussed amongst several was the issue of
10 translators and the ability of Mr. Khadr to
11 understand these proceedings.

12
13 Defense Counsel, and I'm not sure who is going
14 to be the lead -- will that be you, Captain
15 Merriam, or Mr. Ahmad?

16
17 **DC:** Sir, I am not sure that has been determined yet.
18 Mr. Ahmad is going to --

19
20 **Presiding Officer:** Take this issue?

21
22 **DC:** Yes, sir.

23
24 **Presiding Officer:** Mr. Ahmad, have you had a chance to

1 determine whether Mr. Khadr can understand these
2 proceedings if they are all spoken in English?

3
4 **DC:** Sir, I believe that he will be able to
5 understand them. I would note that in the 8-5
6 that we had, you had made arrangements for
7 interpretation to be provided. Omar has been
8 informed on the fact that that is available to
9 him and the headset is here. My understanding
10 is that given that this is a preliminary
11 hearing, I think that he will be able to
12 understand it. However, we've never been in a
13 situation in the course of our representation of
14 him where he has had to deal with the
15 terminology and concepts as complicated as we
16 expect to be here. Especially since he has been
17 without educational instruction for several
18 years.

19
20 So because of that, what we would like to do is
21 to reserve -- to see how it goes today. And I
22 believe that he, up until now, he's been
23 listening in English and understanding. If
24 there comes a time when that is not the case,

1 I'll notify you of that, sir, and I think at the
2 end of this session we'll have a better idea of
3 what our needs will be for future sessions.
4

5 **Presiding Officer:** All right, thank you.
6

7 Mr. Khadr, do you understand what your Defense
8 Counsel, Mr. Ahmad just said?
9

10 **ACC:** Yes, sir.
11

12 **Presiding Officer:** I need you to please speak up so that
13 I can hear you. All right?
14

15 **ACC:** Yes, sir.
16

17 **Presiding Officer:** If, and presently there is a
18 translator available, there is a set of
19 headphones on the table in front you. If for
20 some reason we get to a point where you cannot
21 understand the discussion and you need to make
22 use of that service, please feel free to do so.
23 If I say something or something is being
24 discussed that you don't understand, please

1 either yourself indicate or have Mr. Ahmad tell
2 me, and we will stop and go back over it so that
3 you understand what's being said.

4
5 Do you understand this?

6
7 **ACC:** Yes, sir.

8
9 **Presiding Officer:** I consider it very important that you
10 understand everything that we are doing today as
11 well as throughout these proceedings. So again,
12 I want to make sure you understand if you do
13 have a problem with the language let me know.
14 All right?

15
16 **ACC:** Yes, sir.

17
18 **Presiding Officer:** I understand, defense, that you do
19 not at this time have a defense translator. Is
20 that correct?

21
22 **CDC:** That is right, sir.

23
24 **Presiding Officer:** Have you asked for one?

1
2 **CDC:** We have not at this point. And again, I think
3 that our plan will be to evaluate the need for
4 one based on how things go today.
5

6 **Presiding Officer:** If that becomes an issue please let
7 me know and we can take it up and address it as
8 necessary.
9

10 **CDC:** Thank you, sir.
11

12 **Presiding Officer:** Thank you.
13

14 Mr. Khadr, I want to discuss with you right now
15 your right to counsel.
16

17 **DC:** Excuse me, sir.
18

19 **Presiding Officer:** Pursuant to military Commission --
20

21 **DC:** Sir --
22

23 **Presiding Officer:** I am sorry.
24

1 **DC:** Forgive me. Since we've already begun the
2 discussion about the 8-5 I wonder if this might
3 now be a good time to go ahead and review what
4 else transpired in the 8-5 so that we can see
5 that --

6
7 **Presiding Officer:** I would rather -- I would rather hold
8 that until later. What I'd like to do right now
9 is get through counsel rights. I understand
10 that there's an outstanding issue, and I want to
11 take that up as far as Lieutenant Colonel Vokey.
12 Is there a reason you think you need to do it
13 right now?

14
15 **DC:** Sir, we've already raised the issue. The 8-5
16 occurred over defense objection --

17
18 **Presiding Officer:** Well --

19
20 **DC:** -- there are reasons for that objection and I
21 want to make sure that we air those now while
22 the door is open to that conversation, sir.

23
24 **Presiding Officer:** And I told you that I will give you

1 that opportunity.

2

3 **DC:** All right, sir.

4

5 **Presiding Officer:** If I don't, stand up, tell me that I
6 forgot to --

7

8 **DC:** Yes, sir.

9

10 **Presiding Officer:** -- and I will give you that
11 opportunity. All right?

12

13 **DC:** Yes, sir, understood.

14

15 **Presiding Officer:** What I want to do right now is make
16 sure Mr. Khadr understands his right to counsel
17 and that we take up that issue.

18

19 **DC:** Yes, sir. Thank you. I understand.

20

21 **Presiding Officer:** Mr. Khadr, I want to talk to you
22 right now about your right to counsel per
23 Military Commission Order Number 1. You are
24 represented by Captain Merriam. He is your

1 Detailed Defense Counsel. You also have a right
2 to request a different military counsel
3 represent you. If the person you request is
4 reasonably available, he or she would be
5 appointed to represent you as your detailed
6 Defense counsel. If you are represented by a
7 detailed defense counsel of your own choosing,
8 you would normally lose the services of Captain
9 Merriam. You could, however, request that
10 Captain Merriam remain on your case and the
11 authority that detailed him; that is, the Chief
12 Defense Counsel for the military Commissions, in
13 his sole discretion, could grant or deny your
14 request.

15
16 Do you understand this?

17
18 **ACC:** Yes, sir.

19
20 **Presiding Officer:** Detailed defense counsel are provided to
21 you free of charge. Do you understand this?

22
23 **ACC:** Yes, sir.

1 **Presiding Officer:** Again, I would ask you if you could
2 either speak up or maybe Mr. Ahmad, you could
3 pull the microphone closer. It will pick up his
4 voice a lot better.

5
6 **CDC:** Sir, does this need to be --

7
8 **Presiding Officer:** Pardon?

9
10 **CDC:** -- does anything need to be pressed in
11 order for this to operate or is it picking
12 up his voice?

13
14 **Presiding Officer:** It's voice activated, so if he speaks
15 up, it will pick his voice up.

16
17 **DC:** All right, sir.

18
19 **Presiding Officer:** In addition to detailed defense
20 counsel you have the right to be represented by
21 a qualified civilian lawyer. A civilian lawyer
22 would represent you at no expense to the United
23 States government.

1 To be qualified, he or she must be a U. S.
2 citizen, admitted to the practice of law in a
3 state, district, or territory or possession of
4 the United States, or admitted to practice in
5 front of a United States federal court, may not
6 have been sanctioned or disciplined for any
7 relevant misconduct, be eligible for a secret
8 clearance, and agree in writing to comply with
9 the orders, rules, and regulations of this
10 military Commission. If a civilian lawyer
11 represents you, your detailed defense counsel
12 will continue to represent you as well. And
13 that detailed defense counsel will be present
14 during the presentation of all evidence.

15
16 Do you understand what I've just told you?
17

18 **ACC:** Yes, sir.
19

20 **Presiding Officer:** Do you have any questions about your
21 right to counsel?
22

23 **ACC:** No.
24

1 **Presiding Officer:** All right. As I mentioned, it is --
2 Captain Merriam, you mentioned, again, we did
3 have an 802 conference on the 10th. We had an
4 additional 802 conference today, in which not
5 only the people I cited before were present, but
6 also the assistant prosecutor, Lieutenant [REDACTED]
7 was also present. And at that time we discussed
8 the issue of the defense request for a specific
9 *detailed defense counsel* My understanding is
10 that that request was submitted to the Judge
11 Advocate General of the Navy through the Staff
12 Judge Advocate to the Commandant of the Marine
13 Corps, that that was forwarded by the Staff
14 Judge Advocate to the Commandant of Marine
15 Corps, to the Judge Advocate General of the
16 Navy, with some reservations or questions. It
17 was in turn forwarded to the Chief Defense
18 Counsel for these military Commissions for
19 comment by the Judge Advocate General of the
20 Navy. And that has been provided, those
21 comments have been returned to the Judge
22 Advocate General of the Navy.
23
24 Captain Merriam, have those documents been

1 marked as review exhibits?

2

3 **DC:** No, sir, they have not. I have them here and I
4 will offer them now. I will provide a copy to
5 you, the court reporter, and the prosecution.

6

7 **Presiding Officer:** All right--if you would do that.

8

9 **DC:** Yes, sir. One moment. Sir, I am going to pass
10 three documents. The first one is a memorandum
11 from the Staff Judge Advocate --

12

13 **Presiding Officer:** Let me ask you to do this, please.

14

15 **DC:** Yes, sir.

16

17 **Presiding Officer:** Have they been marked as review
18 exhibits?

19

20 **DC:** They have not, sir.

21

22 **Presiding Officer:** All right. What I would ask you to
23 do is have them marked and then pass them and
24 refer to them by their exhibit numbers.

1 *The exhibits were marked.*

2
3 **DC:** Yes, sir. Sir, I've handed you what's been
4 marked as Review Exhibits 49, 50, and 51.

5
6 **Presiding Officer:** Prosecutor, do you have a copy of
7 these?

8
9 **PROS:** Yes, sir, I do.

10
11 **Presiding Officer:** Thank you. Let me take a minute to
12 look at these.

13
14 **DC:** Yes, sir.

15
16 **Presiding Officer:** Captain Merriam, you've read, in
17 particular, RE 51?

18
19 **DC:** Yes, sir. I have.

20
21 **Presiding Officer:** Specifically looking at -- and I'm
22 referring to Paragraph 5. It deals with the
23 expectations of General [REDACTED]
24

1 **DC:** Paragraph 5 to 51, sir?

2
3 **Presiding Officer:** Yes.

4
5 **DC:** The Email?

6
7 **Presiding Officer:** Fifty one is the Email from Colonel
8 Sullivan to the Judge Advocate General of the
9 Navy.

10
11 **DC:** Yes, sir.

12
13 **Presiding Officer:** Have you read through that?

14
15 **DC:** Yes, sir, I have.

16
17 **Presiding Officer:** Do you have any reservations there or
18 concerns with that? And if you want to take a
19 minute and discuss that with Mr. Ahmad, feel
20 free to --

21
22 **DC:** Yes, sir, I will.

23
24 **Presiding Officer:** -- or with your client.

1
2 **DC:** Sir, I don't have any objection to that.

3
4 **Presiding Officer:** All right. I will -- I was going to
5 note it later, but I will note for the record
6 right now that in my other responsibilities I am
7 the Circuit Military Judge for the Sierra
8 Circuit, which is essentially the same circuit
9 that Lieutenant Colonel Vokey services in his
10 capacity as the Regional Defense Counsel. I am
11 also very familiar with Lieutenant Colonel Vokey
12 and know him to be a very competent and zealous
13 advocate for his clients. I also know him to be
14 very busy. That's why I asked the question.
15 The Sierra Circuit is the busiest trial circuit
16 in the Department of Defense.

17
18 **DC:** Sir, I understand your concern. Just for the
19 record, the paragraph we're talking about is the
20 paragraph in which it says that it's a
21 representation by the Chief Defense Counsel of
22 the Military Commissions relating an
23 understanding between him and the Chief Defense
24 Counsel of the Marine Corps, to the effect that

1 they will both work together to ensure that
2 Lieutenant Colonel Vokey's duties, with respect
3 to the Khadr case, will not interfere with his
4 ability to do his duties as regional Defense
5 counsel. There are any number of ways that both
6 of those two -- that the Chief Defense Counsels
7 can operate to that effect that have nothing to
8 do with his ability to represent Mr. Khadr.

9
10 **Presiding Officer:** So you are saying --

11
12 **DC:** They provide other counsel to the region.

13
14 **Presiding Officer:** You're comfortable with this?

15
16 **DC:** Yes, sir.

17
18 **Presiding Officer:** I think you mentioned also that
19 Mr. Richard J. Wilson has been detailed to this
20 case and he has not appeared before this
21 Commission, has made no appearance. Has that
22 status changed at all in terms of his
23 representation of Mr. Khadr?

1 **DC:** No, sir, it has not changed.

2
3 **Presiding Officer:** And during our 8-5 that we had today,
4 one of the issues I asked counsel to discuss
5 with Mr. Khadr, again, I'll give you leave to
6 take a pass on it if you desire to, is whether
7 or not, because his request is silent on that
8 issue, does he want

9
10 Captain Merriam to remain on the case or not?
11

12 **DC:** Sir, I don't think Mr. Khadr has come to a
13 conclusion about that. I think that is
14 something he wants to discuss with Colonel
15 Vokey, assuming Colonel Vokey is detailed to
16 this case.

17
18 **Presiding Officer:** That's fair enough. That's fair
19 enough. It would be my recommendation, however,
20 and I will ask you, Captain Merriam, to
21 communicate it to Colonel Sullivan. Prosecutor,
22 I'd ask that you communicate it to the
23 Appointing Authority.
24

1 Captain Merriam, should Lieutenant Colonel Vokey
2 be made available that Captain Merriam does
3 remain on the case as Assistant Detailed Defense
4 Counsel. I think that the issues are big
5 enough, and that there is enough work for both
6 of them to be fully employed or engaged in this
7 process. You will please communicate that with
8 ---

9
10 **PROS:** Yes, sir.

11
12 **Presiding Officer:** My respects.

13
14 Mr. Khadr, I understand at this point you want
15 Lieutenant Colonel Vokey to be your detailed
16 Defense counsel. And as it stands right now you
17 are represented by Captain Merriam and Mr.
18 Ahmad. Is there any other defense counsel you
19 want to represent you, military or civilian?

20
21 **ACC:** I would like -- I want a Canadian lawyer of my
22 choice to be added on to my legal team.

23
24 **Presiding Officer:** All right. At this point that's not

1 possible. I will invite your defense counsel to
2 make that the subject of an appropriate motion,
3 which we will schedule to take place in the
4 future. Do you understand that?

5
6 **ACC:** Yes, sir.

7
8 **Presiding Officer:** And with their assistance we will
9 present that and I will decide that issue for
10 you. All right?

11
12 **ACC:** Thank you, sir.

13
14 **Presiding Officer:** And I guess I'll take it up at this
15 point, Captain Merriam. And that is your motion
16 for a continuance. As I had indicated, that's
17 in the REs, I was denying your motion. I did
18 not indicate I was making any ruling on the
19 issue of the availability of whether or not
20 Lieutenant Colonel Vokey should represent the
21 accused. Do you want to state anything further?
22 When I say "further," beyond what is in your
23 written brief that was attached to the record at
24 this time concerning the motion for a

1 continuanance?

2

3 **DC:** Sir, I suppose I do. We should back up just to
4 state for the record; first of all, what that
5 motion was predicated on, and also what these
6 review exhibits that I just offered have to do
7 with that. And that will maybe explain why I
8 want to discuss this motion again now.

9

10 **Presiding Officer:** All right. So long as we're --

11

12 **DC:** No, sir. I --

13

14 **Presiding Officer:** I don't want to litigate the
15 availability of Colonel Vokey or anything else,
16 just the motion for continuance. All right?

17

18 **DC:** Understood, sir. We would reserve the right to
19 litigate the availability of Colonel Vokey, but
20 that to me seems like it's not ripe until he's
21 been determined unavailable.

22

23 **Presiding Officer:** I agree and I -- as I indicated
24 during the 8-5, if you want to make such a

1 motion, and I think I also indicated that I was
2 not ruling on the issue of Colonel Vokey. And
3 should you decide to make that motion and brief
4 it, the trial counsel or prosecutor rather would
5 get an opportunity to respond to it and we would
6 take it up at an appropriate motion session.

7
8 **DC:** Yes, sir. Just to briefly recap. The accused
9 requested Colonel Vokey properly and in a timely
10 fashion in accordance with MCI Number 4 and MCO
11 Number 1. That request was forwarded to the
12 appropriate representative of the government and
13 as of January 6th had not been acted on. That
14 was day fourteen, I believe, since the request
15 was submitted.

16
17 At that point the defense filed a motion
18 requesting a continuance, because there had been
19 no decision. Requested that on three grounds,
20 essentially; either he is going to be granted,
21 in which case, he may not have time to prepare
22 for this session; he is going to be denied, in
23 which case we want the opportunity to seek
24 additional counsel; or we will be in the

1
2 position we find ourselves in today, which is,
3 there has been no action taken although there is
4 strong indications, based on the review exhibits
5 I have just admitted, that it's very likely he
6 will be detailed to this case.

7
8 So I guess the facts have changed, and now we
9 are on day 19 without a decision, but we now
10 have strong indications that the decision, at
11 least in my opinion strong indications, that it
12 will be ultimately determined that he is
13 available and that he will be detailed to this
14 case. So to my mind, at this point, having
15 heard his counsel -- yes, sir?

16
17 **Presiding Officer:** Slow down, please.

18
19 **DC:** Okay, sir. To my mind, having heard the accused
20 on the record state that he wants Lieutenant
21 Colonel Vokey to represent him, this session
22 should be terminated at this point, continued
23 until Colonel Vokey -- until either a decision
24 has been made, or if it's been granted, until he

1 is present.

2
3 The way I see this, sir, this is clear based on
4 the same case law I cited in my motion. And to
5 me it seems to me that there is nothing else to
6 be done in this session, other than discussion
7 of the 8-5 session and clean up the record in
8 that regard, and then continuing the session
9 until Colonel Vokey is either available or not.

10
11 Sir, we essentially --

12
13 **Presiding Officer:** Are you going to say something,
14 Captain Merriam?

15
16 **DC:** Yes, sir. I just want to make sure we are being
17 very clear. This is a fundamental --

18
19 **Presiding Officer:** Please speak slower.

20
21 **DC:** Yes, sir.

22
23 **Presiding Officer:** Not only for my benefit, but for the
24 court reporter's benefit, as she's taking down

1 what you are saying, and you have got a client
2 there whose grasp of English is perhaps not
3 quite as good as yours and mine.

4
5 **DC:** I understand, sir. I'll speak slower. I'm a
6 little excited about this.

7
8 **Presiding Officer:** That's all right.

9
10 **DC:** This is a fundamental right. This is a right
11 that the government, when they wrote the rules
12 for these Commissions, decided to extend to the
13 accused. This is a right that parallels the
14 rights we have in civilian courts. It parallels
15 the rights we have in courts-martial.

16
17 This is not a hard matter of law here. This is
18 a very, very basic right. And it would be an
19 extraordinarily hollow right if we were to say,
20 You have the right to the counsel of your
21 choice. Here is how you request that, and you
22 have done that. Here is the timing that we
23 expect out of you. We expect no appearance of
24 unreasonable delay. And you haven't shown any

1 such delay. But when that counsel -- when we
2 haven't acted on that decision, we the
3 government, who created this right for you, and
4 are the only people who can grant it, who can
5 grant your request, haven't acted on it, we are
6 going to force you to appear at your first
7 Commission session and enter pleas or reserve
8 them, make declarations about motions, conduct
9 voir dire of the Presiding Officer; those are
10 all things that we were brought here to
11 ostensibly do. The government is the one who
12 has this request in their hands and hasn't acted
13 on it. So it should not be a hard decision to
14 come to that, at this point, the accused has
15 made his wishes with respect to counsel known.
16 It's not me, sir. He doesn't want me. He wants
17 Lieutenant Colonel Vokey.

18
19 We have every indication that Lieutenant Colonel
20 Vokey is going to be found available. He's not
21 here. So at this point it seems to me it should
22 not be a very hard decision to come to that we
23 don't really have much more business to conduct
24 here, other than to take matters that happened

1 in 8-5, and otherwise, you know, police up the
2 record and then move on. But all of the things
3 that follow after this, everything from this
4 point forward, in fact, probably what I'm doing
5 right now, this is advocacy. This is more than
6 merely procedure. This is advocacy. And he's
7 entitled to the advocate that he has selected.
8 And he doesn't have that.

9
10 So I suppose what I'm doing is renewing the
11 motion that you previously denied to continue
12 this case until he has that advocate. And it
13 seems to me that we are in an odd position.
14 Either everything that follows after this is a
15 critically important step in this trial, voir
16 dire, entering of pleas, or it's unimportant
17 procedural stuff. Either way, what have we lost
18 by waiting until his counsel is present? If
19 these are critical and important steps, as I
20 believe they are, then we are depriving him of
21 his right. And if they are unimportant, then
22 what is everyone in such a rush for? So I -- I
23 just want -- I guess I am renewing the motion to
24 continue the case. I think that the only

1 business we still have to --

2

3 **Presiding Officer:** Is there anything new you want to
4 say?

5

6 **DC:** No, sir.

7

8 **Presiding Officer:** Okay, thank you. Prosecutor, do
9 you have anything you want to add?

10

11 **PROS (Maj [REDACTED]):** Just briefly, sir. The accused's
12 right to a full and fair trial will not be
13 effected by completing this session that we've
14 scheduled today. In the event that Lieutenant
15 Colonel Vokey or any other selected counsel is
16 detailed to this case they will have the
17 opportunity to raise this as an issue before the
18 Commission at that point. So proceeding today
19 does not violate any rights of the accused. In
20 the event that Lieutenant Colonel Vokey would
21 like to conduct additional voir dire at a later
22 date, I certainly would not object to him
23 conducting additional voir dire on areas that
24 were not covered by counsel today or to ask

1 questions that were not asked today.

2
3 **Presiding Officer:** Thank you. I would note for the
4 record, Captain Merriam, on the week of
5 10 December 2005, I believe you and Mr. Ahmad
6 were in Guantanamo Bay to meet with your client,
7 and there was a discussion that took place
8 between you and -- or not you, but between
9 Colonel Sullivan and Mr. Hodges, where it was
10 attempted to learn who is -- what Mr. Ahmad's
11 desires were with respect to counsel.

12
13 **DC:** Mr. Khadr's, sir.

14
15 **Presiding Officer:** I'm sorry, Mr. Khadr. Thank you.
16 And the defense was unwilling to provide any
17 information so we could better address when to
18 schedule the session. Also your, and it's
19 RE-36, Mr. Khadr submitted a request that was
20 dated, I believe, the 14th of December. It was
21 not acted upon by Colonel Sullivan until the
22 23rd of December. And I think the first time I
23 saw it was when you or Mr. Ahmad provided it to
24 myself and Mr. Hodges as part of your motion for

1 a continuance at about 1700, Thursday of last
2 week; which was just a few hours before I was,
3 myself, supposed to get on an airplane to come
4 out here, which is why I acted on the request at
5 the time as I indicated in my action on it, that
6 I didn't consider your motion timely then.
7 Given he had submitted that request or signed
8 that request on the 14th, my not finding out
9 about it until hours before I got on an airplane
10 to come here, I don't consider timely.

11
12 **DC:** Sir, I can -- if I could, I'd like to address
13 that issue.

14
15 **Presiding Officer:** Pardon, me?

16
17 **DC:** I'd like to address that issue.

18
19 **Presiding Officer:** Well I'll give you an opportunity to
20 address it in a minute. Sit down, please.

21
22 *The defense counsel did as directed.*

23
24 **Presiding Officer:** Also, during the 8-5 I said yesterday

1 and again today that I would give the defense
2 the opportunity to reserve pleas, to reserve
3 motions, that if Colonel Vokey or some other
4 counsel was made available as the Selected
5 Detailed Defense Counsel I would give that
6 individual the opportunity to conduct voir dire
7 of myself at that later time, that my intent was
8 to get these proceedings started so that we
9 would at least get on the record what Mr.
10 Khadr's desires were with respect to counsel and
11 the other matters, and also to come up with at
12 least the beginnings of a trial schedule. Given
13 the logistics of getting down here, getting
14 everyone together, I think that is still the
15 prudent thing to do. And I still intend to push
16 forward.

17
18 As I said, I intend to give the counsel an
19 opportunity to exercise voir dire, challenges of
20 the Presiding Officer. I will ask you if you
21 have motions. I will give you the opportunity
22 to reserve those motions, and I will also give
23 you the opportunity to reserve pleas. And as I
24 said, if there's another counsel made available

1 as detailed counsel, I will give that individual
2 the opportunity to raise or conduct voir dire
3 and exercise challenges against myself as the
4 Presiding Officer, if that individual determines
5 that's what he wants to do. So we will press
6 forward. Your renewed motion for a continuance
7 is again -- I'm sorry, you wanted to say
8 something?

9
10 **DC:** Yes, sir. I just want to make sure I understand
11 you correctly. We are going -- you are going
12 to -- you're going to require us to go forward
13 into voir dire today, but at the same time you
14 are saying that we can do voir dire again
15 when -- when and if new counsel is assigned to
16 this case.

17
18 **Presiding Officer:** Correct.

19
20 **DC:** So I'm not sure I understand what the point of
21 doing voir dire today is if you are already
22 saying that you are going to allow voir dire at
23 a later date by the accused's chosen advocate.
24 And to me actually the system -- of being forced

1 to make a decision about it, is itself error
2 because --

3
4 **Presiding Officer:** I understand your position, Captain
5 Merriam. You will have the opportunity. How
6 you choose to exercise that opportunity is your
7 choice. You are currently representing Mr.
8 Khadr, as is Mr. Ahmad. You've known since I
9 believe it was the 2nd of December that we were
10 coming down here to accomplish those tasks. I
11 would assume that you were prepared to do that.
12 As I indicated, if you want to or the new
13 counsel desires to raise it again, you'll have
14 that opportunity. If you desire to make
15 additional motions on it, we are going to have a
16 motions session, which we intend to set today at
17 least preliminarily. And we are going to press
18 forward.

19
20 Your motion for a continuance or your renewed
21 motion is denied. All right. Anything further
22 on that?

23
24 **DC:** Sir, just for clarification then. I don't think

1 I'm authorized to make a decision about voir
2 dire or not. If I decline because I -- right
3 now I intend to. If I just decline, I'm not
4 waiving the right for some future counsel to do
5 voir dire. Because I don't think I can even
6 say -- I can't say yes, I can't say no, sir.

7
8 **Presiding Officer:** Do you have any -- are you detailed
9 to this case, Captain Merriam?

10
11 **DC:** Sir, I am detailed to this case.

12
13 **Presiding Officer:** And you're representing Mr. Khadr?

14
15 **DC:** Yes, sir.

16
17 **Presiding Officer:** And you are qualified to do so?

18
19 **DC:** I am, sir. I read my qualifications into the
20 record.

21
22 **Presiding Officer:** All right. Then I would expect you
23 to exercise your responsibilities.

1 Anything else?

2

3 **DC:** Sir, I may need to ask for a recess. I mean.

4

5 **Presiding Officer:** Pardon, me?

6

7 **DC:** I may need to ask for a recess -- actually I do
8 need to ask for a recess at this time.

9

10 **Presiding Officer:** All right. How long -- how long --

11

12 **DC:** I have to consult what I believe the limits --

13

14 **Presiding Officer:** I'm sorry. How long would you like?

15

16 **DC:** Sir, 20 minutes should do it.

17

18 **Presiding Officer:** We'll be in recess then until 1630.

19

20 *The Commissions hearing recessed at 1612,*
21 *11 January 2006.*

22

23 *The Commissions hearing was called to order at 1631,*
24 *11 January 2006.*

1
2 **Presiding Officer:** The Commission will come to order.

3 All those present when we recessed are again
4 present.

5
6 Captain Merriam, you asked for the recess.

7
8 **DC:** Yes, sir, I did. Thank you. Sir, I believe --
9 let me back up. I represent to the court right
10 now that my client has not authorized me to
11 conduct voir dire.

12
13 **Presiding Officer:** So you want to reserve voir dire,
14 Captain Merriam? Is that what you are asking?

15
16 **DC:** I have not been authorized to --

17
18 **Presiding Officer:** Captain Merriam?

19
20 **DC:** Yes, sir.

21
22 **Presiding Officer:** Do you want to reserve voir dire?

23
24 **DC:** Well, sir, I -- let me get to my second point

1 and then I'll -- I'll let you know --

2

3 **Presiding Officer:** No I don't want to get to the second
4 point. I want to get to that point.

5

6 Do you want to reserve voir dire?

7

8 **DC:** I do, sir.

9

10 **Presiding Officer:** All right. I will allow you to
11 reserve voir dire.

12

13 Anything else on the issue of voir dire?

14

15 **DC:** Yes, sir. Sir, we keep referring to this 8-5
16 session that happened yesterday. And I just
17 strongly believe we've got to address that now.
18 We've referred to it three or four times.

19

20 **Presiding Officer:** You want to address it now?

21

22 **DC:** Yes, sir.

23

24 **Presiding Officer:** All right, go ahead and address it

1 now.

2

3 **DC:** Thank you, sir. Sir, I have in my possession a
4 document that was served on me by the Assistant
5 to the Presiding Officer two days ago. The
6 document --

7

8 **Presiding Officer:** Do you want to share it with me or --

9

10 **DC:** I do, sir. I'm going to introduce it as a
11 review exhibit. I will provide copies to the
12 prosecution. Do you want me to do that now,
13 sir?

14

15 **Presiding Officer:** Please.

16

17 **DC:** The document is entitled US v Khadr --

18

19 **Presiding Officer:** Let's have it marked, please, and get
20 it to people, then you can tell us what it is.

21

22 *The document was marked.*

23

24 **Presiding Officer:** All right, I was handed it, and it is

1 marked Review Exhibit 52. Counsel want to make
2 sure they annotate it on their copy. And what
3 about this?
4

5 **DC:** Sir, this document was served on me two days ago
6 by the Assistant to the Presiding Officer,
7 Mr. Hodges who -- this document purports to lay
8 out goals for the January 2006 Term in *US v*
9 *Khadr*.

10
11 It's got three columns. The first column says
12 "goal." The second column has "Assistant to
13 Presiding Officer Comments." And the third
14 column says, "Presiding Officer Comments," which
15 is blank.
16

17 The first thing -- and this is really the major
18 thing that I have a problem with this document
19 which is effecting my ability to continue going
20 forward at this point. The exhibit says in
21 regard to 8-5 Conferences, "As soon as the
22 initial session is completed, and without saying
23 on the record that you will have an 8-5, get
24 counsel into chambers." Sir, this is why I

1 filed a motion objecting to having to go to 8-5
2 Conferences. This is why the defense is so
3 leery of holding these off-the-record sessions
4 in your chambers. And, sir, we discussed --
5 we've discussed three times things that were
6 discussed two days ago in your chambers. One of
7 which was voir dire of the Presiding Officer,
8 and representations were made, I believe, in
9 that session that have not been made again here
10 in open session.

11
12 **Presiding Officer:** I'm sorry. Back up please. I didn't
13 hear what you said.

14
15 **DC:** Sir, we discussed things in the 8-5 session that
16 have not so far been discussed in this session.

17
18 **Presiding Officer:** Well, I understand that, Captain
19 Merriam, and that's because several times now
20 I've attempted to move on and you want to stop
21 me and take up issues that we haven't gotten
22 through the things that I have here before me
23 that I want to accomplish in terms of making the
24 record, to include providing reading into the

1 record those things that we discussed during the
2 8-2.

3

4 **DC:** 8-5, yes, sir.

5

6 **Presiding Officer:** I'm sorry. 8-5.

7

8 **DC:** Yes, sir.

9

10 **Presiding Officer:** During that 8-5 that we discussed --

11

12 **DC:** Yes, sir.

13

14 **Presiding Officer:** -- and I indicated to you more than
15 once I believe during the 8-5, if I summarized,
16 and there was something that I omitted that you
17 thought was necessary to be summarized for the
18 benefit of the record, that I would give you the
19 opportunity to do so.

20

21 **DC:** Yes, sir.

22

23 **Presiding Officer:** And I don't think I've done anything
24 or indicated since that that has changed. I

1 also, in trying to address your concerns and lay
2 them to rest, I indicated that I would not
3 decide or rule on anything at an 8-5. I don't
4 believe I have.

5
6 The purpose of an 8-5 is to coordinate with
7 counsel, to talk about things like scheduling,
8 such things as the defense requiring an
9 additional hour this afternoon to spend with
10 their client in order to prepare for today's
11 session, and agreeing to those types of things.
12 Also, to try to assist counsel in resolving
13 issues that come up where perhaps with some
14 guidance or assistance things can be resolved
15 short of coming in here and spending hours on
16 the record beating each other up where we can
17 sit down in a little less formal environment
18 without a room full of people watching you, you
19 can discuss or come to an agreement on them,
20 which I think is in general a much better way to
21 pursue things.

22
23 For example, the proposed trial schedule. As I
24 indicated to you, it's better that you and the

1 trial counsel get together and come to agreement
2 on a proposed trial schedule, rather than me
3 sitting up here on the bench trying to dictate
4 what that schedule would be without any input
5 from counsel as to what your personal schedules
6 and commitments are. That's the purpose of the
7 8-5. It is not to litigate things. It is not
8 to decide issues and I don't believe that I
9 decided or ruled on anything in there.

10
11 **DC:** Sir, that's not what I'm saying. What I'm
12 saying is --

13
14 **Presiding Officer:** Wait, wait, wait.

15
16 **DC:** This document says --

17
18 **Presiding Officer:** Captain Merriam.

19
20 **DC:** Don't go on the record --

21
22 **Presiding Officer:** Captain Merriam.

23
24 **DC:** Yes, sir.

1
2 **Presiding Officer:** I also indicated in that 8-2 or 8-5,
3 rather, that when I ruled on something that was
4 final. Perhaps I should have said, you don't
5 interrupt me. Is that clear?

6
7 **DC:** Yes, sir. It's very clear.

8
9 **Presiding Officer:** All right. You've handed me RE-52.
10 Quite frankly, if I've seen this, I don't recall
11 seeing it. I'm not sure what it is or what it's
12 for. I have no idea why this would have been
13 served on anybody. It appears to be some kind
14 of an internal working document. But, again, I
15 don't know what it is or what it's for. It's
16 not something I'm using or relying on.

17
18 **DC:** Well, sir, that's -- that's what I want to
19 discuss. Because, again, this thing lays out
20 goals for this session. It looks to me.

21
22 **Presiding Officer:** I'm sorry, what?

23
24 **DC:** This document lays out goals for this session.

1 That's the title of it. "Goals of the January
2 2006 Term." It lists goals, as if these are
3 things that must be accomplished. It talks
4 about holding 8-5 sessions without -- it
5 specifically says without saying on the record
6 you will have an 8-5, get counsel into chambers.
7 I mean that -- that is -- that's appalling
8 language, sir. It lists voir dire as a goal, as
9 if there were no other alternative, as if
10 reasons like the lack of the requested counsel
11 were never going to be compelling ones to this
12 session.

13
14 I don't know that that's -- your comments aren't
15 on this document, sir. These are strictly the
16 comments of your assistant. But it appears to
17 be an internal document of the Commission's
18 Office. It's filed -- I mean it's authored by
19 the Assistant to the Presiding Officer, who
20 works for you and for the Presiding Officer in
21 every other case. And it appears to me that --
22 I mean -- what I'm trying to do is explain to
23 you why the defense is so hesitant to go discuss
24 things in chambers with you, because as you just

--

Presiding Officer: Captain Merriam, have I done anything in chambers that I said I would not?

DC: Not yet, sir.

Presiding Officer: Okay. I give you leave, Mr. Ahmad leave, that if I do, then at the very next session in this Commission, assuming you are still present, if Mr. Ahmad is still present, you may come in here and the first thing on the record you are free to put that on the record that I have done something in that 8-5 that I said I wouldn't. And that would be to decide an issue. If we come in here and I fail to allow you to fully summarize something that you think needs to be made a part of the record, because that is certainly appropriate, that it be summarized and it reflect what we discussed if counsel think appropriate. If I do that, then I give you leave to raise it, to stand up before we recess because it is my habit, I think, to ask counsel if there's anything else that they

1 want to bring up before we recess, to raise that
2 issue. If I don't, I give you leave to file
3 appropriate papers. They will be marked as REs
4 and attached to the record to protect your
5 client's rights. All right?

6
7 **DC:** Sir, I guess what I'm trying to say is I think
8 we are at that point now. Because right
9 before -- the reason I asked for the recess,
10 sir, is that I -- I asked you a question about
11 what I understood to be your representation in
12 the 8-5 session about voir dire. I asked you if
13 I declined to do voir dire am I waiving this,
14 because my understanding based on your
15 conversation in the 8-5 was that you were going
16 to allow Lieutenant Colonel Vokey or any other
17 counsel --

18
19 **Presiding Officer:** Whatever your concerns are of voir
20 dire, I thought I resolved those a moment ago.
21 I indicated I would allow you to reserve voir
22 dire until you have either Colonel Vokey or
23 whomever Mr. Khadr desires present on the case
24 and representing him. I don't know how much

1 more I can do with that than that. Okay?

2

3 Is there anything else I can do to relieve your
4 concerns about voir dire?

5

6 **DC:** Not voir dire specifically, sir, but about this
7 8-5 session, yes.

8

9 **Presiding Officer:** About what?

10

11 **DC:** About the 8-5 session, sir.

12

13 **Presiding Officer:** All right. Well -- I'm sorry. Go
14 ahead.

15

16 **DC:** Well, given the nature of what I think is the
17 only -- of this document.

18

19 **Presiding Officer:** I cannot account for that document.

20 As I said, if I've seen it, I don't recall
21 seeing it. It is not something I prepared and
22 is certainly not something I've been using.

23

24 **DC:** Well, sir, just -- because I don't know what this

1 document is either. All I know is what it looks
2 like.

3
4 **Presiding Officer:** Captain Merriam, let me stop you
5 right here.

6
7 **DC:** Yes, sir.

8
9 **Presiding Officer:** There is a point in this proceeding
10 where you will be given the opportunity or
11 Colonel Vokey, whomever detailed counsel is, or
12 Mr. Ahmad will be given the opportunity to
13 present motions. Part of that motion process is
14 discovery. If you think it's important or
15 counsel representing Mr. Khadr believe it's
16 important, I give you leave to make it the
17 subject of an appropriate motion. I'm not
18 ruling on any motions. I'm not indicating
19 whether I would grant a discovery request
20 concerning that or allow someone to testify
21 concerning that or anything else. I give you
22 leave to raise it and I think the appropriate
23 place to do that would be in a motions session,
24 not here and not now, because as you just said,

1 you don't know.

2

3 **DC:** Right, sir.

4

5 **Presiding Officer:** Trial counsel doesn't know. Quite
6 frankly, I don't know.

7

8 **DC:** Sir, can I ask -- that is not what I intend to
9 ask for. I understand. I think you are exactly
10 right about that. We don't know what this is.

11

12 **Presiding Officer:** Slow down, please.

13

14 **DC:** But I would like to ask --

15

16 **Presiding Officer:** Slow down, please.

17

18 **DC:** Yes, sir. I'd like to ask you for an order
19 reserving the opportunity to voir dire the
20 Assistant to the Presiding Officer at the
21 appropriate time, and preserving all
22 communications to the Assistant Presiding
23 Officer, and the Presiding Officer, and any
24 other Presiding Officer or other Commission

1 officials.

2
3 **Presiding Officer:** No.

4
5 **DC:** I need to have this preserved, sir. This is --
6 this is what appears to be an internal document
7 authored by the Assistant to the Presiding
8 Officer.

9
10 **Presiding Officer:** Slow down.

11
12 **DC:** Which raises serious concerns about the openness
13 and fairness of the proceeding -- I've got to
14 have that -- I've got to have this and other
15 internal documents that the Assistant to the
16 Presiding Officer is involved in preserved.

17
18 **Presiding Officer:** I am not going to issue such an
19 order, and I am not at this point going to allow
20 you to voir dire the Assistant to the Presiding
21 Officer. As I said, there will be a time and a
22 place for that, and you can make that motion or
23 your successor or Mr. Ahmad may make that
24 motion.

1
2 **DC:** Very well, sir.

3
4 **Presiding Officer:** Trial counsel or, excuse me,
5 prosecutor at this point I want to open up the
6 opportunity for you to conduct voir dire, but
7 since I've given the defense the opportunity to
8 reserve that, would you like to reserve that as
9 well?

10
11 **APROS:** Sir, if I may, we would like -- we are prepared
12 to conduct voir dire and would like to do that.

13
14 **Presiding Officer:** You may proceed if you would like to.

15
16 **APROS:** Yes, sir. Due to the defense reserving -- for
17 procedural aspects, I'd like to respectfully
18 request this permission.

19
20 **Presiding Officer:** I need you to speak up. I'm having
21 trouble hearing you.

22
23 **APROS:** I apologize, sir. At the next session, we would
24 like to reserve the right to ask follow-on

1 questions after defense does their voir dire,
2 should it be necessary.

3
4 **Presiding Officer:** All right.

5
6 **APROS:** Also, should something between this session and
7 the next session, a new fact that was not known
8 come up requesting the need for voir dire, we'd
9 just like permission to ask new questions on new
10 facts. That's something that will probably
11 happen anytime in the trial anyway, but...

12
13 **Presiding Officer:** All right. I'll allow you to do
14 that.

15
16 **DC:** Sir, the defense objects to that. I mean if we
17 are going to reserve voir dire, let's just
18 reserve it and let's just all do it at the same
19 time.

20
21 **Presiding Officer:** Denied. Sit down, please. And I
22 would note for the record I've provided a
23 summarized biography of myself along with
24 response to defense questions and they are

1 marked as RE 18 and 29.

2
3 In addition, as I mentioned before, I do know
4 Lieutenant Colonel Vokey professionally and I
5 think he is a highly qualified and competent
6 both officer and attorney. Lieutenant?

7
8 **APROS:** Thank you, sir. In regards to the 30
9 December 2005 questions that you answered from
10 the defense, you had indicated that you had no
11 prior --

12
13 **Presiding Officer:** Give me just a minute to bring that
14 up.

15
16 **APROS:** Yes, sir.

17
18 **Presiding Officer:** All right. I have it in front of me.
19 What specific question are you referring to?

20
21 **APROS:** Sir, on Page 3 of that document, question six.

22
23 **Presiding Officer:** Yes.

1 **PROS:** You indicate that you had no prior knowledge of
2 the facts of this case.

3
4 **Presiding Officer:** That's correct.

5
6 **PROS:** Since that time to now, sir, do you have any
7 knowledge of the facts of this case?

8
9 **Presiding Officer:** No.

10
11 **APROS:** Outside --

12
13 **Presiding Officer:** I've seen the charge sheet. That's
14 all I've seen.

15
16 **APROS:** Correct, sir. Outside of what has already been
17 filed in this case?

18
19 **Presiding Officer:** No.

20
21 **APROS:** Sir, have you in any way read or been exposed to
22 any type of media reports; TV documentaries,
23 press conferences or press reports regarding the
24 accused's family?

1
2 **Presiding Officer:** I think I've seen something that said
3 his father was killed, I believe in Pakistan.
4 And he has a -- his father immigrated and I
5 don't recall from where to Canada, where he was
6 either born or raised with several brothers and
7 sisters. Again, I don't recall the number. And
8 at some point they moved from Canada, and I
9 don't recall if it was Afghanistan or Pakistan.
10 I want to say Pakistan, and it seemed like they
11 moved back to Canada and then back to
12 Afghanistan or Pakistan. They moved back and
13 forth between Afghanistan and Pakistan.

14
15 **APROS:** Sir, will that prior knowledge of those facts in
16 any way impact on your ability to be impartial
17 to this accused and to ensure that he receives a
18 full and fair trial at all times?

19
20 **Presiding Officer:** No.

21
22 **APROS:** Will that in any way play an impact in any
23 factual decision you may have to make predicate
24 to a legal motion in this case?

1
2 **Presiding Officer:** No.

3
4 **APROS:** Sir, have you read or been made aware of any
5 type --
6

7 **Presiding Officer:** Wait. Let me back up for a minute.

8 When I say his father was killed in -- and,
9 again, I think it was Pakistan, the articles
10 that I had seen also indicated he was somehow
11 associated or friends with Osama bin Laden, was
12 involved in al Qaida. But I don't know the
13 specifics of it.
14

15 **APROS:** Again, sir, would that have any impact?
16

17 **Presiding Officer:** It does not impact me at all. I
18 intend to decide the issues that are presented
19 here in court based on the evidence presented
20 and the law as I understand it.
21

22 **APROS:** Just to carry on with that, sir, with the news
23 reports, press articles or any of the same, have
24 you learned any knowledge about the al Qaida

1 terrorist organization?

2
3 **Presiding Officer:** Well, sure. I think I indicated in
4 my -- I don't recall if it was the biography or
5 the questionnaire that at one point I served as
6 the Staff Judge Advocate for I Marine
7 Expeditionary Force. And during the time we
8 received briefings on what was going on,
9 intelligence briefings. And I recall nothing
10 specific about those, and I wouldn't reveal it
11 here in court anyway because it may be
12 classified. I'm not sufficient.

13
14 **APROS:** No, I understand, sir.

15
16 **Presiding Officer:** But there's nothing about that that I
17 recall specifically and certainly nothing that I
18 can think of that would impact me here.

19
20 **APROS:** Sir, if throughout this trial you somehow do
21 recall, for whatever reason, something you have
22 heard in these briefings or from a press report,
23 and you feel it may impact your ability to be
24 impartial or it may impact your ability to

1 ensure the accused receives a full and fair
2 trial, how will you handle that?

3
4 **Presiding Officer:** I would inform counsel, allow them
5 the opportunity to inquire and exercise a
6 challenge, if they determined it was
7 appropriate. If I felt it was somehow
8 disqualifying, I would disqualify myself and
9 recuse myself and ask that a new Presiding
10 Officer be detailed. Let me also say that when
11 I say, "intelligence briefings" as best I recall
12 they were things that dealt with the historical
13 background of Afghanistan and Pakistan, the
14 tribes and the relationships and some of the
15 cultural type things. I don't recall anything
16 specifically on any particular organization or
17 individual.

18
19 **APROS:** But it is safe to say, sir, that counsel can
20 trust that if you believe an issue comes up you
21 will address it.

22
23 **Presiding Officer:** Certainly. That's my responsibility
24 and my oath.

1
2 **APROS:** Yes, sir. Sir, in your questionnaire you had
3 mentioned that you had occasion to try cases
4 that dealt with the Geneva Conventions or
5 possibly international law that you've had some
6 sort of dealings with the law of armed conflict.

7
8 **Presiding Officer:** Correct.

9
10 **APROS:** Obviously, during that time, sir, you've
11 probably looked at treatises, maybe law review
12 articles, certain types of legal authority. If
13 I may, will that prohibit you from coming to any
14 legal motion filed by either party with an open
15 mind?

16
17 **Presiding Officer:** No. The cases that I tried, there
18 were two of them as I recall, and they dealt
19 with abuse of Iraqi detainees by Americans,
20 actually Marines -- actually they dealt with the
21 Geneva Conventions. And the issue turned on
22 whether or not there was a duty by U.S. Marines
23 to protect individuals who came into their care,
24 whether they be POWs or detainees or however you

1 want to characterize them. And it was litigated
2 and I ruled. The cases were tried. I believe
3 both individuals were -- they were convicted of
4 some of the charges, acquitted of not all of the
5 charges. They were involved in OIF-I, Operation
6 Iraqi Freedom One. I think the Convening
7 Authority has still not acted on those cases.
8 It was -- I intend to decide the issues
9 presented here in this Commission based on the
10 law as I understand it.

11
12 Commission law, the term we've used to try to
13 capture things such as the Presiding Officer
14 Memorandums, the President's Order, Military
15 Commission Orders. When deciding an issue, I
16 think it's appropriate to read counsel's briefs
17 and I depend heavily on counsel to educate me as
18 to what they believe the law is. And then I
19 intend to do my own research and make my ruling.
20 And when I make such a ruling, I will inform
21 counsel of the law that I am following. And if
22 counsel think it appropriate or desire that I
23 provide additional indication of what law I've
24 applied, I can certainly allow them to ask for

1 that.

2

3 **APROS:** Sir, for your duties here as Presiding Officer,
4 does anybody write a fitness report or any kind
5 of evaluation on you?

6

7 **Presiding Officer:** No.

8

9 **APROS:** As a follow on, is there any type of evaluation
10 that's going to be made of you for purposes of a
11 promotion board, sir?

12

13 **Presiding Officer:** No. I was due to retire, and I
14 explained this to counsel. I was due to retire.
15 It was actually effective 1 April, but I was
16 going to go on terminal leave, until I was
17 detailed to this Commission. I'm at my career
18 maximum. I'm not going to be promoted. I'm not
19 looking to be promoted. I am a Colonel of
20 Marines and I will retire a Colonel of Marines.

21

22 **APROS:** Sir, from the time of your consideration for
23 being a Presiding Officer.

24

1 **Presiding Officer:** What does that mean?

2
3 **APROS:** When you were first notified that you were being
4 considered for the position of Presiding
5 Officer.

6
7 **Presiding Officer:** No. I was never notified I was being
8 considered for the position. I was asked. And
9 I don't recall when the first time, whether I
10 was interested in it because the Marine Corps,
11 and I think all of the services were tasked to
12 provide five nominees to be Presiding Officers.
13 We were tasked to provide a data sheet which was
14 brief beyond description. I think I still have
15 a copy of the second one. I don't know if I
16 have a copy of the first one, a data sheet to
17 Headquarters Marine Corps, which I think was
18 then forwarded up to OMC. I'm speculating on
19 that. I believe it was.

20
21 At some point they were -- the services I
22 believe were asked to renew or validate those
23 nominations and I was asked to update or
24 validate that my data sheet was current or

1 correct, which I did, just before submitting.

2 And I think it was after *Hamden* was decided by
3 the Circuit Court of Appeals.

4
5 I asked the Deputy Staff Judge Advocate to the
6 Commandant of the Marine Corps whether or not
7 there was a possibility I would be selected for
8 this. I was told, probably not, simply because,
9 I think, he didn't think it was going -- he
10 wasn't sure that anything was going to happen at
11 any time in the near future. And I don't know
12 that he was speaking from a position of
13 particular information, but I asked him if there
14 was a possibility. Based on that, I submitted
15 my retirement letter. I asked to go ahead and
16 retire effective 1 April. And then the next
17 thing I heard on it was I received a call from
18 Mr. [REDACTED] I believe he's the Chief of Staff
19 for the Commissions, indicating I had been
20 selected. But I don't think Mr. Altenberg had
21 signed the paperwork or signed the letter
22 appointing me, detailing me. And we discussed
23 the issue of my pending retirement. He
24 discussed that with Mr. Altenberg and indicated

1 if I was willing to continue on active duty even
2 past my retirement date that that would not be a
3 problem. And then I received -- later I
4 received a letter in the mail. But there wasn't
5 a period where I was told I'm being considered
6 for this. It was just a phone call saying that
7 I had been selected.

8
9 **APROS:** Well, sir, from the phone call, from that time,
10 sir, has anyone ever come up to you in any way
11 and discussed a certain outcome is desired in
12 this Commission?

13
14 **Presiding Officer:** I'm not sure what you mean by outcome
15 desired. Nobody has ever told me that they're
16 looking -- first of all, I've never discussed
17 *U.S. versus Khadr* with anybody. The facts -- I
18 don't know any of the facts of *U.S. versus*
19 *Khadr*. I don't know what that evidence is. I
20 don't know what the witnesses are and nobody has
21 hinted, indicated, tapped the floor or anything
22 else that they want a certain result. Were they
23 to do something like that, depending on who they
24 were, and when I say that, who I'd report it to,

1 I would probably put them on report.

2
3 The only guidance I have, if you will, is what
4 the President said. He wants a full and fair
5 trial. And that is what I intend to see, is a
6 full and fair trial. And I have no desire, I
7 don't want, wouldn't like, or anything else to
8 see a particular outcome other than that--
9 whether Mr. Khadr is convicted of anything or
10 not will be up to the Commission. What I want
11 to see when I walk out of here is that he has
12 gotten that full and fair hearing and that
13 people realize he received that full and fair
14 hearing, to include Mr. Khadr.

15
16 **APROS:** Sir, would it be appropriate to say that you
17 personally as you sit there today as our
18 Presiding Officer, that you feel completely free
19 and independent to ensure that the accused
20 receives a fair, full and fair and impartial
21 trial?

22
23 **Presiding Officer:** Yes.

1 **APROS:** Two final questions, sir.

2
3 Is there anything in your background, whether it
4 be personal or professional, that you feel could
5 impact on your ability to give this, the
6 accused, a full and fair trial and to be
7 impartial?

8
9 **Presiding Officer:** No.

10
11 **APROS:** Last question, sir.

12
13 Should anything come up that would in any way
14 prohibit you, prevent you, or unlawfully
15 influence you in being fair, full and fair trial
16 and being impartial, how will you handle that?

17
18 **Presiding Officer:** Ask your question again.

19
20 **APROS:** Yes, sir. I'm sorry it did come out a little
21 convoluted.

22
23 Should anything come up, whether it be in your
24 personal or professional background that you

1 remember, or should anything come up through any
2 kind of unlawful influence that would effect
3 your ability, continued ability, to be impartial
4 to the accused and to ensure that he receives a
5 full and fair trial, I'm asking you: How would
6 you handle that situation, sir?

7
8 **Presiding Officer:** As I said earlier, if something I
9 recalled, I thought impacted on that, I would
10 notify counsel of that. And I quite frankly
11 can't conceive, short of a death threat, what
12 could influence me to throw the case, if you
13 will.

14
15 **APROS:** Now, if any government official purports to
16 call you and say --

17
18 **Presiding Officer:** I don't mean to be flippant about it,
19 but they can't shave my head and send me to
20 Okinawa anymore. As I said, I'm going to retire
21 1 July. I'm not promotable. I'm not going to
22 get promoted. I will retire a Colonel of
23 Marines. My retirement pay is fixed. There's
24 nothing that anyone can do to my career or

1 otherwise to influence that. Were someone to do
2 that, aside from me reporting it to whoever
3 their boss was or to the Appointing Authority, I
4 would obviously also make counsel aware of that
5 so you could all take whatever action you
6 thought was appropriate, either in the way of
7 voir dire or challenges or whatever you thought
8 was appropriate.

9
10 **APROS:** Sir, I thank you for answering those questions.

11
12 **Presiding Officer:** Captain Merriam, I know you want to
13 reserve voir dire.

14
15 Do you want to ask any questions at this point?

16
17 **DC:** No, sir.

18
19 **Presiding Officer:** All right. Government, do you desire
20 to exercise a challenge?

21
22 **APROS:** No, Your Honor, we do not.

23
24 **Presiding Officer:** Captain Merriam, do you want to

1 reserve challenges until such time as you've
2 exercised voir dire?

3

4 **DC:** Yes, sir.

5

6 **Presiding Officer:** All right. I'll permit you to do so.

7

8 It appears at this point all the -- do you need
9 a moment?

10

11 **CDC:** No, sir, I was just was trying to --

12

13 **Presiding Officer:** No, that's fine. If you need to
14 explain something to him and you need a moment,
15 I'll wait.

16

17 **CDC:** Thank you. I appreciate the time you are
18 affording. I was able to explain that to him.

19

20 **Presiding Officer:** I'm sorry?

21

22 **CDC:** He just had a -- he asked a clarifying question
23 about the last colloquy, and I was just trying
24 to clarify that for him.

1
2 **Presiding Officer:** All right, if -- and like I said, if
3 you need a moment to explain something before I
4 go on, please just hold your hand up or
5 something. All right?

6
7 **CDC:** Thank you. I appreciate that.

8
9 **Presiding Officer:** It appears that all the persons
10 before the Commissions have the requisite
11 qualifications and have been sworn.

12
13 Defense counsel, trial counsel [*Prosecutor*] has
14 indicated you've received a copy of the charge
15 sheet. I don't believe he indicated you
16 received a copy of the Arabic translation, but I
17 do believe that's the case.

18
19 Is that not the case?

20
21 **DC:** Sir, we have and, for the record, he did
22 indicate that earlier, so we do have it.

23
24 **Presiding Officer:** All right. Prosecutor, do you want

1 to state for the record or, excuse me. Will you
2 state for the record the general nature of the
3 charges, please.
4

5 **PROS:** Yes, sir.
6

7 **Presiding Officer:** The general nature of the charges in
8 this case are:
9

10 Charge I: Conspiracy to attack civilians, to attack
11 civilian objects, to commit murder by an
12 unprivileged belligerent, to commit the offense
13 of the destruction of property by an
14 unprivileged belligerent, and to commit
15 terrorism.
16

17 Charge II: Murder by an unprivileged belligerent.
18

19 Charge III: Attempted murder by an unprivileged
20 belligerent.
21

22 And Charge IV: Aiding the enemy.
23

24 **Presiding Officer:** Defense, do you desire that the

1 charges be read?

2

3 **DC:** No, sir, we waive reading.

4

5 **Presiding Officer:** The reading will be omitted.

6

7 Do all counsel understand the provisions of the
8 Military Commission Order Number 1 governing
9 protected information? Prosecution?

10

11 **PROS:** Yes, sir.

12

13 **Presiding Officer:** Defense?

14

15 **DC:** No, sir.

16

17 **CDC:** Excuse me, sir.

18

19 **Presiding Officer:** I'm sorry.

20

21 **CDC:** Can we just have a minute?

22

23 **Presiding Officer:** You may.

24

1 **CDC:** Thank you.

2
3 *The civilian counsel conferred with the accused.*

4
5 **CDC:** Thank you, Your Honor.

6
7 **Presiding Officer:** Do counsel also understand that they
8 have a continuing obligation to, as soon as
9 practical, notify me of any intent to offer
10 evidence involving protected information, so
11 that I may consider the need to close the
12 proceedings. Prosecution?

13
14 **PROS:** Yes, sir.

15
16 **Presiding Officer:** Defense?

17
18 **DC:** Yes, sir.

19
20 **Presiding Officer:** The prosecution has proposed three
21 protective orders. And during both the first
22 and the second 8-5, we discussed those, and I
23 know there was an exchange of e-mail. And I
24 believe we reached agreement on the first two,

1 probably the third one, and I have signed the
2 first two protective orders. And defense, you
3 specifically agreed to the language in those
4 first two protective orders. Is that correct?

5
6 **DC:** That's correct, sir.

7
8 **Presiding Officer:** I believe those are marked as RE-45
9 and 46.

10
11 The third protective order, I think there is
12 still some discussion, and it's my intent that
13 once we conclude here we will finish
14 wordsmithing that, assuming there is no issue
15 from either side and I will sign that. It will
16 be marked as an RE and appropriately issued. If
17 there is an issue, and by that I mean either
18 side contest the language in that protective
19 order, then we will reconvene before we leave
20 the island this week and we will litigate that
21 and I will resolve that and then issue that
22 order.

23
24 Any objection to that procedure?

1
2 **PROS:** No, sir.

3
4 **DC:** No, sir.

5
6 **Presiding Officer:** I'm required by Military Commission
7 Order Number One to consider the safety of the
8 witnesses and others--during these proceedings.
9 I remind counsel they must notify me of the
10 issues regarding safety of potential witnesses,
11 so that I might direct the appropriate methods
12 in which to present that testimony and ensure
13 the security of all the parties and the
14 witnesses.

15
16 Is either side aware of any other protective
17 orders that have been issued other than the two
18 that I've signed?

19
20 Prosecutor?

21
22 **PROS:** No, sir.

23
24 **Presiding Officer:** Defense.

1
2 **DC:** No, sir.

3
4 **Presiding Officer:** Does either side request any
5 additional protective orders other than the two
6 I've signed as well as the third one which I
7 intend to sign once we've worked out the exact
8 language?

9
10 Prosecutor?

11
12 **PROS:** No, sir.

13
14 **Presiding Officer:** Defense?

15
16 **DC:** No, sir.

17
18 **Presiding Officer:** All of the Presiding Officer
19 Memorandums which have been issued so far to
20 this date remain in effect and I believe they
21 are marked as a review exhibit. That would be
22 Review Exhibit 44. And defense, you've
23 indicated you have copies of all of those POMs,
24 is that also correct?

1
2 **DC:** That is correct, sir.

3
4 **Presiding Officer:** The current filings inventory, which
5 is marked as Review Exhibit 43 has been attached
6 to the record, and I believe counsel also have a
7 copy of that; is that also correct?

8
9 **DC:** Yes, sir.

10
11 **Presiding Officer:** Defense?

12
13 **DC:** Yes, sir.

14
15 **Presiding Officer:** And I just remind counsel that that
16 filings inventory is particularly important, as
17 it is our -- particularly my guide as to what's
18 before the Commission, in terms of motions that
19 need to be litigated and issues that need to be
20 resolved. If it is not accurate, it is your
21 responsibility to review it and ensure that it
22 is accurate. If you note a deficiency, it's
23 your responsibility to advise either myself or
24 the assistant to the Presiding Officer at your

1 earliest opportunity so we might take care of
2 that.

3
4 Defense counsel, it's your desire to reserve
5 motions?

6
7 **DC:** It is, sir.

8
9 **Presiding Officer:** Go ahead and take a moment to talk
10 with --

11
12 **DC:** One, moment, thank you.

13
14 *Defense counsel conferred.*

15
16 **DC:** Sir, my co-counsel informs me he does want to
17 make one motion at this time, but it's our
18 intent to reserve motions for a later date.
19 It's particularly relevant to the current
20 session and to events that are happening in
21 relation to that session, but I should let him
22 speak for himself in that regard.

23
24 **Presiding Officer:** All right. Mr. Ahmad?

1
2 **CDC:** Sir, I know from our 8-5 session yesterday that
3 you prefer --
4

5 **Presiding Officer:** I need you to please speak up.
6

7 **CDC:** Sure.
8

9 **Presiding Officer:** It's not only for my benefit and the
10 court reporter, but I've been told that the
11 people that are sitting somewhere outside this
12 room that are watching these proceedings are
13 having a very difficult time hearing.
14

15 **CDC:** I understand, sir. I'll do my best to raise my
16 voice a bit. I know from our 8-5 session
17 yesterday that you prefer motions to be put in
18 writing and I would prefer to be able to give
19 you this motion in writing. Because of the time
20 circumstances to which it relates, that's not
21 possible, and so I'd like the opportunity to
22 make this motion orally. If you don't rule on
23 it, I would be more than happy to reduce it to
24 writing for consideration thereafter. I can

1 tell you what the motion relates to. Is what
2 I'd like to do is --

3
4 **Presiding Officer:** Well, why don't you make the motion.
5 I'll tell you whether I'll rule on it --
6 depending on what it is, I'll rule on it now or
7 defer it until we have a motion session.

8
9 **CDC:** All right. Sir, this motion that I'd like to
10 make now relates to the making of inappropriate
11 prejudicial extrajudicial statements by the
12 prosecution. This is based on statements that
13 were made at a press conference that was held --
14 sponsored by the Defense Department yesterday.
15 And it's made in light of the fact that
16 immediately after this session there is
17 scheduled another press conference at which, my
18 understanding is, the prosecution will be
19 available. The reason I am making this motion,
20 sir, is that I was -- I both was in attendance
21 at the press conference yesterday and heard
22 statements from the Chief Prosecutor in this
23 office, I believe is Colonel Morris Davis. And
24 I've seen reports of those comments in various

1 media outlets in the papers today. Those
2 comments, sir, in my view, are in violation of
3 the Colonel's ethical obligations under the
4 Armed Forces Rules of Professional Conduct as
5 well as under the Rules of Professional Conduct
6 of the jurisdictions in which he practices or he
7 is licensed.

8
9 Specifically, sir, there are two rules. One of
10 which exists in all three of the bodies of
11 professional conduct to which I'm referring.
12 It's Rule 3.6, in the Air Force rules, also Rule
13 3.6, in the rules of professional conduct by the
14 District of Columbia, where it's my
15 understanding that the Chief Prosecutor is
16 licensed; and Rule 3.6 of the Rules of
17 professional conduct for the state of North
18 Carolina.

19
20 **Presiding Officer:** Okay. Let me stop you for just a
21 minute.

22
23 **CDC:** Sure.

1 **Presiding Officer:** What is the relief you are seeking at
2 this point?

3
4 **CDC:** Sir, the relief I'm seeking is in two forms.

5
6 First, I'm asking for an instruction to the
7 prosecution to refrain from making statements
8 that are in violation of either Rule 3.6 of
9 those three bodies of Rules of Professional
10 Conduct, as I just mentioned, as well as Rule
11 3.8 of the Rules of Professional Conduct of the
12 District of Columbia and North Carolina.

13
14 If I can just say briefly, sir, that Rule 3.6
15 relates to trial publicity and Rule 3.8 relates
16 to special -- it's titled "Special
17 Responsibilities of a Prosecutor," that's the
18 title in North Carolina's rules. There is a
19 comparable title in the District of Columbia.
20 Both of those rules are based upon the American
21 Bar Association's Model Rules of Professional
22 Conduct.

23
24 So the first form of relief I'm seeking is an

1 instruction to the prosecution, then, to refrain
2 from making extra-judicial statements in
3 violation of those rules.

4
5 The second form of relief I'm seeking, sir, is
6 an order to the prosecution to take steps to
7 remediate those statements that were made
8 yesterday.

9
10 **Presiding Officer:** Hold on just a minute.

11
12 **CDC:** Yes, sir.

13
14 **Presiding Officer:** So you are asking for a ruling for
15 me, an order from me directing the prosecution
16 to refrain from making extra-judicial
17 statements?

18
19 **CDC:** In violation of the specific rules.

20
21 **Presiding Officer:** Right.

22
23 **CDC:** That's the first form of relief.

1 **Presiding Officer:** The second relief?

2
3 **CDC:** The second form of relief I'm seeking, sir, is
4 an instruction to the prosecution to take steps
5 to remediate for the comments that were made
6 yesterday in violation of those rules.

7
8 If I may, sir?

9
10 **Presiding Officer:** Just a minute.

11
12 **CDC:** Sure.

13
14 **Presiding Officer:** All right. Please go ahead.

15
16 **CDC:** The remediation I think could take several
17 different forms. This is with respect to the
18 second form of relief I'm seeking. I think it
19 could be remediated in several ways.

20
21 I would suggest the most appropriate way to
22 achieve that remediation would be for the Chief
23 Prosecutor to retract those statements he made
24 yesterday with respect to my client, Omar Khadr,

1 because they were unduly prejudicial. They were
2 in violation of the rules governing this
3 prosecutor, because he does have special
4 responsibilities under the bodies of
5 professional responsibility I've cited, and
6 because he has special responsibilities with
7 regard to pretrial publicity. That's the form
8 of remediation that I think is most appropriate.
9 I would be open to considering others that you,
10 sir, think would be appropriate.

11
12 However, my bottom line is that I think some
13 form of remediation is necessary in light of the
14 statements that were made yesterday.

15
16 **Presiding Officer:** Do you have -- quite frankly, I've
17 been a little busy the last couple days. I
18 haven't been watching the press. Do you have
19 copies of these statements he made or a
20 transcript of the press conference?

21
22 **CDC:** Sir, what I have, and I understand that you've
23 been busy and that's why I don't have a written
24 motion for you. What I have --

1
2 **Presiding Officer:** Because I've been busy or because
3 you've been busy?
4

5 **CDC:** Well, because you've been busy and I've been
6 busy too. And those two things aren't
7 unconnected.
8

9 **Presiding Officer:** I think you're right.
10

11 **CDC:** What I have in front of me are copies of various
12 newspaper articles that quote from the Chief
13 Prosecutor. What I would like to do is to
14 briefly give three examples of statements that
15 are reflected in those -- in those that I heard
16 myself.
17

18 **Presiding Officer:** I think I'm not going to let you do
19 that. What I would ask: Do you have multiple
20 copies or just a single copy?
21

22 **CDC:** Sir, I do not have multiple copies. I certainly
23 can arrange to have those. I do think it's
24 important, however, in order for you to make a

1 threshold determination of whether to rule upon
2 this to have some sense of what the nature of
3 the comments were.
4

5 **Presiding Officer:** Well, so do I, that's why I was
6 asking if you had copies of the articles. Quite
7 frankly, I don't want to -- whether I'm inclined
8 to rule or not, I'm not going to rule based on
9 just a snippet here or there being read into the
10 record. What I want to see at a minimum would
11 be the articles that you are referring to in
12 their entirety.
13

14 **CDC:** Absolutely.
15

16 **Presiding Officer:** And I would like a copy of those.
17 Perhaps the bailiff -- I'm not sure how much
18 longer we'll be here, but while we are talking
19 perhaps the bailiff can take those and make
20 copies for myself, trial counsel -- excuse me,
21 prosecutor, and a copy for the record, and then
22 we can have those marked as an exhibit. If it's
23 going to take longer than that or you don't have
24 much else to say until I've read them, then

1 maybe we should just take a short recess to do
2 that. That would also give everybody a chance
3 to read them. In fact, as I say that, I think
4 that's what I intend to do. But before we do
5 that, do you have copies of the particular rules
6 that you are referring to that you believe are
7 applicable to Colonel Davis?

8
9 **CDC:** I do, sir. Perhaps what I could do if we are
10 going to take a recess, I could within about ten
11 minutes prepare a packet that has -- and I again
12 I apologize for not having this --

13
14 **Presiding Officer:** No, sir. Don't apologize.

15
16 **CDC:** -- before we came in the door.

17
18 **Presiding Officer:** That's fine.

19
20 **CDC:** But I can prepare the news articles to which I
21 am referring and copies of what I believe to be
22 the applicable rules and make those available to
23 the prosecution and, of course, to you, sir.

1 **Presiding Officer:** All right. Okay. I think that would
2 be appropriate at this point. Trial counsel or
3 prosecutor rather, do you have anything you want
4 to -- any comment you want to make before we
5 take a recess?

6
7 **PROS:** Sir, I would just ask that this motion be
8 reduced to written form and we have time to
9 respond appropriately. Colonel Davis is
10 certainly aware of his ethical obligations and
11 responsibilities and certainly in light of the
12 fact that the defense has raised it in this
13 case, any further comments that he would have,
14 I'm sure would be well within his ethical
15 responsibilities. He would keep them in mind.
16 So I don't think any order from the Presiding
17 Officer would be necessary.

18
19 **Presiding Officer:** Comments, Mr. Ahmad?

20
21 **CDC:** Yes, sir. In principle I agree with the
22 prosecution that it would be better to reduce
23 this to writing. That would provide me the
24 opportunity to direct the Commission to relevant

1 case law beyond just the rules, which I think
2 would be quite favorable to the position that
3 I'm advocating.
4

5 **Presiding Officer:** Well, it certainly would be helpful.
6

7 **CDC:** And I -- I can -- I can provide -- I did not
8 mention this earlier, I can provide both the
9 prosecution and the Commission with at least one
10 case that I think is relevant here.
11

12 The larger point, however, is that though I
13 agree with the prosecution in principle that it
14 would be better, and that's I believe why you
15 have expressed your preference that things be
16 put in writing rather than made orally. The
17 fact that there is now another press conference
18 that's been scheduled --
19

20 **Presiding Officer:** Well, I understand that. I don't
21 want to beat that part to death.
22

23 **CDC:** Okay. I would just -- if I could just in
24 response in to what the Major has said, I don't,

1 respectfully, I don't make this motion lightly.
2 And respectfully, I don't believe that
3 self-policing by the prosecution, in light of
4 this motion, is sufficient. And that is what I
5 heard in the statement that was made by the
6 Major.

7
8 **Presiding Officer:** I think that's what he said.

9
10 **CDC:** And I disagree with that.

11
12 **Presiding Officer:** Okay. Let's do this. Let's take a
13 recess. We are not in recess yet until I drop
14 the gavel, so everybody just sit still. That's
15 why I use the gavel so everybody knows when we
16 are either on the record or off.

17
18 We are going to take a recess, make copies, put
19 them together. Please provide a copy to the
20 government counsel, provide a copy to me. If
21 you would, also provide a copy to the court
22 reporter and she will mark that as the RE. And
23 then when everybody is ready, after we've had a
24 chance to read it, please let the bailiff know.

1 He'll get everybody back together and we'll
2 reassemble.

3
4 Do you want your client, Mr. Khadr, to remain in
5 here, or do you want him to be taken back to his
6 area?

7
8 **CDC:** Sir, we'd prefer that he remain here.

9
10 **Presiding Officer:** All right. We are in recess.

11
12 *The Commission hearing recessed at 1722, 11 January 2006.*

13
14 *The Commission hearing was called to order at 1810,*
15 *11 January 2006.*

16
17 **Presiding Officer:** The hearing will come to order. All
18 those present when we recessed are again
19 present.

20
21 Mr. Ahmad, I read through your -- partially
22 through your package. I'll be honest, I didn't
23 read it all. A half an inch of material here,
24 and it's after 1800. And I'm not going to read

1 it all tonight. I did read the one or two
2 Articles that seemed to contain some information
3 or excerpts from Colonel Davis' interviews with
4 the press. They also indicate as I read them
5 that you have also had some interviews with the
6 press; is that correct?

7
8 **CDC:** Yes, it is. I was --

9
10 **Presiding Officer:** I'm sorry. Please speak up.

11
12 **CDC:** Yes, sir, it is. I was a participant in the
13 same press conference yesterday.

14
15 **Presiding Officer:** All right. As I understand your
16 motion, you want me to order Colonel Davis and
17 other members of the prosecution to comply with
18 their ethical responsibilities; is that correct?

19
20 **CDC:** Sir, I would like you to instruct the
21 prosecution to -- I'm not sure that you can
22 order Colonel Davis to. I don't think that he's
23 entered an appearance here. I would note,
24 however, that --

1
2 **Presiding Officer:** Well, I think -- I think that I can
3 do what I believe is necessary. And the actions
4 of Colonel Davis as the Chief Prosecutor would
5 be something I can take into account if later on
6 I decided that some type of corrective action
7 were required.

8
9 **CDC:** Yes, sir.

10
11 **Presiding Officer:** So the fact that he has not made an
12 appearance here is of no particular moment to me
13 at this point. I also think that members of the
14 U.S. military, when they are told to do
15 something will do it, particularly if they are
16 the Chief Prosecutor and they think it will
17 adversely impact a case that they are
18 responsible to see to the prosecution of.

19
20 Quite frankly, I think that were I to order
21 something, the Appointing Authority would do one
22 of two things; tell me, No, he's not going to do
23 it, or make it happen. If he tells me he's not
24 going to do it, obviously, we could take that up

1 here in court, but it wouldn't be ignored. I
2 guess, is what I'm saying.

3
4 **CDC:** I understand what you are saying, sir, and I
5 guess in an abundance of caution I was saying
6 that I didn't know the answer to that question.
7 What I wanted to volunteer, I certainly don't
8 disagree with anything that you have said, but
9 in addition to that, what I would suggest is
10 that Rule 3.8 of both the DC rules and the Rules
11 of North Carolina extend not only to the
12 prosecutor who is before you, but those who are
13 associated with him or her. So I do think that
14 the applicable rules do allow you that reach in
15 addition to what you said.

16
17 **Presiding Officer:** I don't think the extent of my reach
18 is really at issue here.

19
20 **CDC:** Okay.

21
22 **Presiding Officer:** So I think we are in agreement.

23
24 **CDC:** Yes, sir.

1
2 **Presiding Officer:** At this point I am not prepared to
3 rule on your motion. What I am prepared to do
4 is hold a hearing tomorrow, in which I will give
5 counsel time to brief the issue and provide
6 additional exhibits for both sides, because I
7 think it's an important issue.

8
9 I would note for the benefit of the parties and
10 just remind them, and I believe the defense you
11 do have copies of these, that back on
12 1 December of 2005 shortly after I was appointed
13 to this Commission I provided to the members of
14 the Commission a letter of instruction, which
15 specifically told them to avoid any news
16 accounts of this or any other Commission
17 proceedings, just to protect Mr. Khadr's rights
18 for a fair trial. That was put out, not at the
19 request of the prosecution and not at the
20 request of the government, but it was put out at
21 my direction to ensure that Mr. Khadr gets his
22 fair and full trial by a panel that's free from
23 the effects of pretrial publicity.

1 It's also, I think, part of the process or will
2 be part of the process that counsel will be
3 given the opportunity to voir dire all of the
4 members. Quite frankly, given the amount of
5 publicity that this case and the case just
6 immediately proceeded us here are receiving, and
7 will receive, I would anticipate some extensive
8 voir dire from both the government and from the
9 defense on that issue, which is why I put out
10 the instruction to the members to avoid any
11 press accounts that might occur.

12
13 And that specifically alluded to surfing the
14 internet where they might get on CNN or Fox news
15 or any one of the other multitude of websites
16 that may carry information concerning these
17 proceedings; as well as watching news accounts
18 on the TV and reading things in magazines or
19 other periodicals.

20
21 And I believe that's a fairly effective
22 prophylactic that's already in place to protect
23 Mr. Khadr's rights. There's also a provision in
24 the MCI, both 3 and 4 that require both the

1 prosecution and the defense to receive
2 permission before they engage in such press
3 conferences.

4
5 Do you know, Major, if the government has
6 complied with that?

7
8 **PROS:** To my knowledge, sir, Colonel Davis did receive
9 permission to speak with the media.

10
11 **Presiding Officer:** All right. And, Mr. Ahmad, have you
12 received such permission?

13
14 **CDC:** Yes, sir, I have.

15
16 **Presiding Officer:** What I would ask both sides to do is
17 between now and tomorrow get a copy of that
18 permission and provide it to Mr. Hodges so it
19 can be made a review exhibit. I will also, at
20 this time, ask -- excuse me, no, I don't ask.
21 I'm directing the Prosecutor to convey to
22 Colonel Davis my concerns and the defense's
23 concerns and ask that he consider those before
24 engaging in any additional press conferences.

1 Those concerns on my part are not his ethical
2 responsibilities. I think that's an issue
3 between he and his licensing authority. But
4 it's the impact of his statements that they may
5 have on these proceedings. And I would caution
6 the defense as well. There are allegations out
7 there from both sides that I don't know who they
8 are all attributed to. I don't care to get into
9 that at this point. But I think it would be in
10 everybody's best interest if perhaps the
11 rhetoric were toned down. And I would ask you
12 to convey that to Colonel Davis.

13
14 You were going to say something, Mr. Ahmad.

15
16 **CDC:** I don't want to interrupt you, sir, but if I
17 could comment at some point when you are done,
18 I'd appreciate that opportunity.

19
20 **Presiding Officer:** I will give you that opportunity,
21 certainly.

22
23 **CDC:** Thank you, sir.

1 **Presiding Officer:** Because at this point it's my intent
2 to hold this over until tomorrow afternoon, give
3 counsel an opportunity to brief and provide
4 additional exhibits should either side desire to
5 do so, so that I can make an intelligent ruling.
6 Realizing that there is some sense of urgency
7 because of this pending press conference is why
8 I'm making the comments that I am making at this
9 point, and giving the direction to Prosecutor
10 that I'm giving.

11
12 Obviously, the defense will be given that
13 opportunity to conduct voir dire concerning --
14 of the members concerning the impact of any
15 pretrial publicity, as will the government,
16 concerning any pretrial publicity that may have
17 been generated by either the defense or those
18 sympathetic with the defense's case that might
19 prejudice a panel against the government to
20 where the government would be denied a full and
21 fair trial, because they are entitled to that
22 same full and fair trial that the accused is
23 entitled to. You wanted to make a comment?

1 **CDC:** Yes, sir. First of all, I don't intend this to
2 challenge in any way the decision that you've
3 made. I've heard what you said and I accept it.
4 I do in some sense want to apologize to both the
5 Commission and the Prosecution. I by no means
6 meant to spring 70 pages or whatever the number
7 is at this late date. To be honest with you,
8 when I went back and put it together, it was a
9 larger packet than -- than I thought. We don't
10 really know each other. I would like to assure
11 you that this is not the way that I want to
12 practice in this Commission.

13
14 **Presiding Officer:** Mr. Ahmad, let me cut you off right
15 now, because I've got to say from my dealings
16 with both trial and defense up to this point,
17 all the parties have been extremely
18 professional. The briefs, particularly, and I
19 made this comment at the 8-5 that counsel object
20 to, but the briefs that I've been provided, have
21 been particularly from defense, Captain Merriam,
22 have been extremely well written, extremely well
23 done. And I very much appreciate that. It's
24 that level of professionalism and courtesy that

1 often is missing in legal proceedings today and
2 I appreciate the professionalism of all the
3 parties.
4

5 I do not question your ethics, your motives, or
6 anything else in springing it, if you will, at
7 the late time. I understand that things come
8 up, that we've all been busy. It's short fused.
9 People, in addition, to needing time to figure
10 out what they need to do, they need to digest
11 information and decide what the appropriate
12 course is, confer with other counsel and things
13 of that nature, so no apology is necessary. I
14 don't have any issue there whatsoever.
15

16 **CDC:** Thank you, sir. And if I just briefly can say,
17 then, I'm glad that that is the perception.
18 That is how it is intended. I would not have
19 made this motion at the late date if I didn't
20 think it was serious enough and time sensitive
21 enough.
22

23 Having said that, in your comments you noted
24 that in the materials that I provided to the

1 Commission and to the prosecution that I have
2 made press statements as well. And that is
3 true. I heard and have accepted your
4 recommendation regarding the care that we all
5 take in speaking to the press and I agree with
6 that. I just want to note, however, that there
7 is a different standard to which the prosecution
8 is held with regard to statements to the press
9 than there is to the defense. And that's a
10 legal standard. That's different as between
11 their side of the table and my side of the
12 table. So while I appreciate that in your
13 observation that I did, in fact, make comments,
14 I do want to say that I have a different role in
15 this process than the prosecution does. And my
16 role, my sole role is with respect to Omar
17 Khadr. The government has a role to prosecute,
18 but they also have a role in terms of upholding
19 the integrity of an entire system. And that's
20 what's on the line. Sir, now I have an implicit
21 role in that, but it's not the same. And the
22 rules of ethics make that clear. That's exactly
23 why there is a special rule in DC and in North
24 Carolina and in the model rules -- and I don't

1 know this for sure, I would suspect in a number
2 of other states in the United States. There is
3 a special rule with respect to prosecutors.
4 There is no special rule with respect to defense
5 lawyers. I seek to practice while here as I
6 would anywhere else to the highest ethical
7 standard possible, but I do wish to make clear
8 that structurally within our system of law there
9 is a different standard for prosecutors than
10 there are for defense lawyers.

11
12 **Presiding Officer:** All right. That's not a ruling.

13 You've made a statement. It's on the record,
14 and we are going to move on.

15
16 **CDC:** Yes, sir.

17
18 **Presiding Officer:** I happen to think that you are
19 correct in that regard. I also happen to think
20 that all counsel have a responsibility to try
21 their case in the forum where it's to be tried,
22 not in the press. And that's where I come down.
23 I think it does no one any good for either side
24 to put inflammatory, outrageous statements out

1 there that are not supported by either fact or
2 law or otherwise.

3
4 It would be my hope that we would try this case
5 here in this Commission room and not in the
6 press. And I realize that the defense has a
7 responsibility to look out for the interest of
8 their client. I also recognize that the
9 government does have a much greater
10 responsibility and it's not to put somebody in
11 jail, but to see that justice is served.

12
13 It's a principle that I fully support. With
14 that in mind, what I intend to do is put this
15 matter over until tomorrow. I would like the
16 defense to serve the government their brief by 8
17 o'clock tomorrow morning. You have all night to
18 work on it.

19
20 Prosecution, I want to see your response brief
21 by noon. Some time after that, we will come
22 back together and I will take a look at it and
23 see if any additional orders from this
24 Commission are in order.

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All right. Any questions on that?

PROS: No, sir.

Presiding Officer: When I say "your briefs," also if there's evidence that either side desires to submit in support of their position, I would ask that you exchange that at the earliest opportunity with opposing counsel and provide it to the Commission at the earliest opportunity, because a lot of it takes a long time to read. Particularly, I note there is an article in here from Colonel Davis. It's a very lengthy Article, 20 some-odd pages. So if there's those types of things that you are wanting each side -- the other side to look at and me to look at, it would be very helpful if I had that earlier rather than later. And I'm here until Saturday. I can be here until Saturday of the week after. So we can take as long as we need, and we will take as long as we need to sort through it. All right?

1 It's 1825. We've been here for quite some time.
2 I would like counsel's thoughts on whether we
3 should take a recess here in the building, have
4 dinner and then come back on the record to
5 finish up the other things that we have to do
6 tonight.

7
8 **PROS:** The prosecution would just as soon continue,
9 sir.

10
11 **Presiding Officer:** Captain Merriam, your desires?

12 There's not a lot more that we have to do, but
13 there are some other things we need to do.

14
15 **DC:** Okay, sir. I think we can finish what I think
16 we have to do remaining on the trial script, so
17 to speak, but, you know, other than this motion
18 tomorrow, I don't think there's anything else we
19 need to take up.

20
21 **Presiding Officer:** Right, but do you want to continue
22 tonight or do you want to take a break for
23 dinner and then continue. I don't know whether
24 your client needs to eat dinner. I believe they

1 would bring a dinner to him here.

2
3 **DC:** Sir, one minute.

4
5 Sir, if I could ask the Presiding Officer just
6 what else do we think, other than argue this
7 motion, what else is it that the parties believe
8 we have to take up? I'm not sure what -- I mean
9 is there something else we can't resolve right
10 now before -- what would we be coming back from
11 dinner to resolve, sir?

12
13 **Presiding Officer:** I still want to ask the accused for
14 his pleas, even though he's indicated he's going
15 to reserve them. I'm not going to ask you to
16 enter them. I just want to call for those.

17
18 I think you've already indicated you want to
19 reserve motions with the exception of one
20 motion. I want to discuss the trial schedule.
21 We've discussed quite extensively your motion
22 for a continuance. However, I have not
23 mentioned, and I did intend to mention, your
24 motion for an abatement of the proceedings, not

1 to litigate but simply indicate for the record
2 that you had made that motion, that I denied
3 that motion. I believe that was RE-37. As I
4 indicated, I denied your motion for an
5 abatement. I did not rule on the issue. And as
6 I indicated in the 8-5, I invite counsel, should
7 you deem that appropriate, to raise a motion
8 during the motions session, or Colonel Vokey.

9
10 I issued a discovery order, it's RE-20. I
11 wanted to remind counsel of the dates that are
12 contained in there. Government, you have a
13 responsibility to provide discovery too. And at
14 this point it would be to Captain Merriam, until
15 such time as either Colonel Vokey or other
16 Detailed Defense Counsel comes on the case,
17 provide that discovery to the defense.

18
19 Defense, you have until the 28th of February to
20 provide reciprocal discovery. I gave counsel a
21 31 January 2006 deadline for filing a motion to
22 object to the discovery order or the way it was
23 being executed.

1 However, we need to talk about the trial
2 schedule and I think it would appropriate to
3 modify that date to make it consistent with
4 whatever motions dates we come up with.

5
6 I think that would be all of it. I think that
7 would be all of the things I would want to
8 discuss tonight, short of giving you, Captain
9 Merriam, the opportunity to put anything in the
10 record concerning the 8-5 that I didn't already
11 discuss that you think is appropriate to go in
12 the record. So with that in mind, do you want
13 to take a recess for dinner or do you want to
14 press on?

15
16 **DC:** Sir, I'm just going to consult with my client
17 for one minute.

18
19 **Presiding Officer:** Please.

20
21 *The defense counsel conferred with the accused.*
22

23 **Presiding Officer:** There's one other issue I want to
24 discuss before we break today, and that's the

1 accused's attire. Again, we can take that up
2 now or after we eat dinner. What is the
3 defense's preference?
4

5 **DC:** Sir, our preference would be to break for dinner
6 and then come back.
7

8 **Presiding Officer:** All right. Well, how long -- let's
9 break. The security personnel can figure how
10 long it will take and then once everybody is
11 ready to go, we'll reconvene. All right?
12

13 **DC:** Yes, sir.
14

15 **Presiding Officer:** The court's in recess.
16

17 *The Commission hearing recessed at 1830, 11 January 2006.*
18

19 *The Commission hearing was called to order at 1930,*
20 *11 January 2006.*
21

22 **Presiding Officer:** The Commission will come to order.

23 All those present when the Commission recessed
24 are again present.

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All right. At this time I want to go ahead and ask the accused to enter pleas, understanding he intends to reserve those pleas.

Accused and counsel, please rise.

The accused and his counsel did as directed.

Presiding Officer: Mr. Khadr, I now ask you: How you plead? Understanding that you are entitled to reserve those pleas, please be seated.

DC: Sir, may I speak for the accused?

Presiding Officer: At this point?

DC: Yes, sir.

Presiding Officer: On what issue?

DC: Oh, I'm sorry. I thought you required an answer.

1 **Presiding Officer:** No, no. I understand he wants to

2 reserve those. I just formally want to do that

3 on the record. I think I already mentioned the

4 motion by the defense to abate, and that's been

5 marked as an appellate exhibit. I want to take

6 up the issue of scheduling at this point. And

7 let me preface that with a comment that I

8 understand that there may, in fact, and most

9 likely will be a new detailed defense counsel in

10 this case, that he obviously hasn't agreed to

11 that schedule. That's all understood.

12
13 If Colonel Vokey or some other counsel comes on

14 to the case, then they certainly are welcome to

15 suggest or request a modification to that

16 schedule. But I think it's important that we at

17 least establish some kind of a timeframe that we

18 want to get things done by so that we can start

19 working towards those.

20
21 As I said, Captain Merriam represents the

22 accused at this time, and will continue to

23 represent him until such time as he is relieved

24 along with Mr. Ahmad. I'm not sure what will

1 happen with Mr. Wilson whether he intends to
2 actually make an appearance or not. If he does,
3 we will take that up when it happens. I was
4 provided a proposed schedule. Has then be
5 marked as a review exhibit at all?

6
7 **PROS:** It has not, sir.

8
9 **Presiding Officer:** All right. I think what I will do is
10 I'll just simply mention these dates here on the
11 record. As I indicated I gave counsel until the
12 31st of January to submit objections to the
13 discovery order. I'm going to modify that so
14 that it is consistent with this proposed
15 schedule. And what I would expect is motions --
16 and the parties have couched these as legal
17 motions. That's as good of characterization, I
18 think, as any.

19
20 Basically, we are talking about motions that
21 don't depend on discovery that we would -- those
22 motions would be served on opposing counsel and
23 the Commission no later than the 24th of
24 February; responses to those by the 10th of

1 March; replies by 17 March and then during the
2 week, and I've indicated a week here, and I told
3 counsel that, of 27 March, sometime during that
4 week we would return here to Guantanamo Bay to
5 litigate those motions. Those dates apply
6 equally to any objections to the discovery
7 order.

8
9 Evidentiary motions, again, motions that would
10 require discovery and I would include in that
11 anything such as witnesses, request for
12 investigative assistance, expert witnesses,
13 anything along that line I would expect to see
14 those motions served on opposing counsel and the
15 Commission by 14 April; responses by the 28th;
16 replies by the 5th of May. And then, again,
17 during the week of 22 May we would return here
18 to Guantanamo Bay to litigate those evidentiary
19 type motions. And I understand, Captain
20 Merriam, that you haven't spoken -- I'm
21 presuming you haven't spoken to Colonel Vokey on
22 it. I would presume that, but you are otherwise
23 amenable to these dates; is that right?
24

1 **DC:** Yes, sir.

2
3 **Presiding Officer:** Captain Merriam.

4
5 **DC:** Yes, sir.

6
7 **Presiding Officer:** Is there anything else about the 8-5
8 that has not been reflected in the record that
9 you would like to reflect for the record that
10 you believe needs to be summarized for a
11 complete record?

12
13 **DC:** Yes, sir. I submitted a Review Exhibit to the
14 court reporter. I think its been marked 54; is
15 that correct, 54, the next in order. It
16 contains a narrative based on notes of defense
17 counsel of what transpired in the 8-5. I
18 provided it to the government, I'm not sure
19 they've had enough time to review it.

20
21 **Presiding Officer:** Let's do this. We are going to get
22 back together at 1300 tomorrow. Major, if
23 there's an issue there where either something
24 that you are in a disagreement with, assuming

1 it's material. Let's bring it up and we can
2 resolve it tomorrow.

3
4 **PROS:** Yes, sir.

5
6 **Presiding Officer:** Is that acceptable?

7
8 **DC:** Yes, sir.

9
10 **Presiding Officer:** The last thing I have that I wanted
11 to discuss was the accused's attire. And I
12 understand there are some logistic challenges.
13 I consider his attire inappropriate. I consider
14 any shirts with logos to better left for places
15 other than a court of law and a Commission. If
16 possible, by tomorrow I would like that
17 resolved. I think the trousers are fine but the
18 shirt is not.

19
20 If Mr. Ahmad, Captain Merriam, you cannot
21 resolve that by yourselves. Major, I would ask
22 you and perhaps you can seek the assistance of
23 the JTF personnel before Mr. Khadr appears
24 before this Commission again. I'm not talking

1 about a business suit or anything, but perhaps a
2 collared shirt without logo would be more
3 appropriate. All right?

4
5 **PROS:** Yes, sir.

6
7 **Presiding Officer:** Any questions on that?

8
9 **DC:** No, sir.

10
11 **Presiding Officer:** Anything else either side wants to
12 address before we recess for the evening?

13
14 **PROS:** No, sir.

15
16 **DC:** None, sir.

17
18 **Presiding Officer:** Mr. Ahmad?

19
20 **CDC:** No, sir.

21
22 **Presiding Officer:** All right, until 1300, then, tomorrow
23 the Commission will be in recess.

1 *The Commission hearing recessed at 1937, 11 January 2006.*

2
3 *The Commissions Hearing was called to order at 1530,*
4 *12 January 2006.*

5
6 **Presiding Officer:** The hearing will come to order. All
7 those present when we recessed are again
8 present.

9
10 Let me apologize, first, for the delay. I know
11 there are many people who are sitting around for
12 a long time expecting this to start at 1300.
13 The issues that are to be decided are extremely
14 important, and it will be my intent throughout
15 the proceedings to give counsel and myself the
16 time we need to handle those issues in an
17 appropriate manner. Regrettably, that may
18 inconvenience some of the people, particularly
19 observers and the media. I regret that. We
20 will try to keep you informed so that you can
21 plan accordingly, but it will happen. And as
22 you saw yesterday, the sessions may go much
23 later than you might otherwise be used to.
24 Again, we will try to keep you informed so that

1 you can plan accordingly.

2
3 The first thing I want to take up with counsel
4 is RE-54, which was the defense summary of the
5 8-5 session. I believe it just addresses
6 10 January 2006; is that correct, Captain?

7
8 **DC:** Yes, sir, that's correct.

9
10 **Presiding Officer:** And I would note that we did have a
11 short lectern of sorts placed at each counsel
12 table. I would ask counsel to use that. I
13 think it will assist in the difficulty with the
14 microphones picking up what people are saying.
15 It's also, I think, a little more convenient for
16 the use of counsel as well, although you will
17 have to move to it.

18
19 Major [REDACTED] did you have any objections to,
20 additions to, or comments about RE-54?

21
22 **PROS:** Just a couple comments, sir. I agreed with the
23 notes in large part, but I did want to note that
24 in Paragraph 5 Captain Merriam talked about, or

1 stated that the Presiding Officer does not rule
2 at an 8-5 session, and follows on and talks
3 about your practices after the Presiding Officer
4 makes a ruling. My recollection of the 8-5
5 conference, that those were separate thoughts
6 and not connected.

7
8 **Presiding Officer:** I think that's fair. I noticed
9 Captain Merriam, you are shaking your head, yes,
10 approvingly. I don't think it was intended to
11 run those together. As I recall, he was writing
12 rather rapidly both, I believe, he and
13 Mr. Ahmad, and they were separate thoughts. I
14 was simply trying to give counsel some guidance
15 of my practice, because none of you have
16 practiced in front of me and have the benefit of
17 that. I, like I think any judicial official, if
18 I can use that term, Presiding Officer in this
19 case, have my own quirks, things that I expect
20 of counsel. And I think it's helpful if you
21 know those in advance, so we don't have to
22 embarrass anybody here on the record in front of
23 anybody. And if they are a problem for anybody,
24 we can discuss them and resolve those.

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Anything else?

PROS: In Paragraph 9, sir, I note that Captain Merriam's notes have Mr. Hodges asking Professor Ahmad about the accused's intentions regarding representation. My recollection was that the Presiding Officer asked that question. I don't know that it matters to the defense, but that was my recollection of it.

Presiding Officer: I don't know that it matters either. I know Mr. Hodges did ask some questions. I don't recall if he asked that specific question. I do know in Paragraph 8 it does indicate that I asked about Mr. Wilson simply to find out if he intended to appear before the Commission. I don't see it as a discrepancy of any particular moment. And I will defer to the defense's recollection quite frankly.

PROS: The only other note that I had, sir, was Paragraph 29 where we discussed what the accused would be wearing in court sessions. My

1 recollection was that the Presiding Officer said
2 that he would not be wearing a jumpsuit under
3 any circumstances. There was no question about
4 whether that was possible.

5
6 **Presiding Officer:** Well, that's not what I said. That's
7 what I intended, and that's the case.

8
9 Anything else?

10
11 **PROS:** That's all I have, sir.

12
13 **Presiding Officer:** All right. And taking up the issue
14 of attire, I note that Mr. Khadr is attired in
15 a -- what I consider a more appropriate, a
16 regular collared shirt, long sleeve shirt,
17 button down the front. And I think that is more
18 appropriate attire for the nature of these
19 proceedings.

20
21 Again, defense counsel, if there is some other
22 particular attire along that line that the
23 defense would like to see, please attempt to do
24 so. If you can't resolve it on your own, let me

1 know and I'll in turn -- or let the Prosecutor
2 know, rather, and I'm sure they will be able to
3 assist you. All right?
4

5 **DC:** Thank you, sir. The government was very helpful
6 in assisting us with getting this attire.
7

8 **Presiding Officer:** Thank you. The one thing that I did
9 want to note, and it has to do with the -- your
10 summary of the 8-5. One of the things that we
11 did discuss during the 8-5 that is not included
12 in here is how individuals will be addressed.
13 And I indicated that I would address counsel by
14 their grade and their last name, and Mr. Ahmad
15 by Mr. and Ahmad as I've done throughout, and
16 that I would address Mr. Khadr as such. Mr.
17 Khadr is an adult. This is about as an official
18 and important a forum as I can envision. He's
19 on trial for murder. I think it's appropriate
20 that he be addressed as Mr. Khadr and not by his
21 first name or his given name. And I will task
22 counsel to do so both in writing and in their
23 oral colloquy that we have here in court.
24

1 Any questions on that?

2

3 **DC:** No, sir.

4

5 **PROS:** Sir, I would only ask that we could refer to Mr.
6 Khadr as the accused.

7

8 **Presiding Officer:** Well, yes. What I'm saying is not by
9 his first name only, either the accused, Mr.
10 Khadr, but not Omar. I think that represents
11 too casual an approach, given the nature of the
12 proceedings.

13

14 The other thing I'm not sure of in RE-54, there
15 are some things that are in bold print, and
16 there are some things that are not. Is there
17 any significance to that, Captain Merriam?

18

19 **DC:** Sir, not really. The significance is just that
20 those were things that we considered important.
21 This was intended just to be my best recapture
22 of our combined notes. And those were things
23 that in our notes we would have put a star by or
24 underlined. It was entirely for emphasis.

1
2 **Presiding Officer:** Strictly for your internal use?

3
4 **DC:** Yes, sir.

5
6 **Presiding Officer:** Because, quite frankly, I don't
7 attach any particular significance to one
8 paragraph vice another. And in attaching this
9 to the record, I will note that I did not.

10
11 **DC:** Understood, sir.

12
13 **Presiding Officer:** And I do consider it a fair summary
14 of what was discussed. Let me also say just for
15 the benefit -- you can go ahead and have a seat,
16 Captain Merriam.

17
18 *The defense counsel did as directed.*

19
20 **Presiding Officer:** While you are free to do this if you
21 like. It seems like a lot of effort. I think
22 my experience, and I think the traditional
23 practice is you note things that are of
24 particular significance, or that you object to,

1 or that I perhaps left out when I summarized it,
2 as opposed to trying to summarize every possible
3 thing that was said during the meeting. It
4 might save you some time. I mean, it's your
5 call. If this is what you want to do, how you
6 want to spend your time, it's your time. You
7 are the best manager of that time. So I just
8 point that out.

9
10 Mr. Ahmad, yesterday during your discussions,
11 initially, we talked about the need for a
12 translation service for Mr. Khadr. You said
13 you weren't sure how things were going to go,
14 but after the first proceeding perhaps you
15 would know better. Have you got anymore
16 insight as to the need for a translator for
17 him?

18
19 **CDC:** Sir, I believe that we'll be okay without a
20 translator. I guess what I had in mind was at
21 the close of the proceeding, meaning since it
22 got carried over today, at the close of today,
23 I'd like to have a conversation with Mr. Khadr
24 before Captain Merriam and I leave. My sense

1 at this point is that things are working fine
2 without an interpreter and that that's probably
3 how things will be in the future. But if it's
4 all right with you, I'd would like to reserve
5 final --

6
7 **Presiding Officer:** You can reserve that, and that's
8 fine. And if it comes up -- if you waive on a
9 translator or interpreter and it comes to a
10 point where you decide you need one, with
11 appropriate time to get the people here, please
12 just let me know and we will make that
13 available. As I said yesterday, it's very
14 important Mr. Khadr understand what's being
15 said in these proceedings. So if that becomes
16 something that you think is necessary or
17 helpful, let me know and we will make it
18 happen.

19
20 **CDC:** Yes, sir. I appreciate that. I think that, as
21 has happened in the proceeding yesterday, there
22 will be times when I think we'll have to take a
23 little bit of a break. But that has less to do
24 with Arabic versus English and more to do with

1 the complexity of the terminology.

2
3 **Presiding Officer:** All right. Well, that's common for
4 any criminal proceeding and has nothing to do
5 generally with an individual's grasp of English
6 as much as it is just the concepts that are
7 being thrown around in the courtroom. So
8 that's fine.

9
10 **CDC:** Yes, sir.

11
12 **Presiding Officer:** Please let me know if something of
13 particular significance, you need a recess in
14 order to go somewhere else to discuss it where
15 you can have a little more privacy and spend a
16 little longer discussing it. Again, just let
17 me know and we'll make that available to you.

18
19 **CDC:** Thank you, sir.

20
21 **PROS:** Sir, if I could address that briefly. I would
22 just ask that we have at least 30 days notice
23 if the defense does want translator services.
24 The government does procure those in D.C. We

1 have to make arrangements to have the
2 translators travel to Guantanamo Bay. Country
3 clearances are involved and the availability of
4 --

5
6 **Presiding Officer:** I understand the logistics involved
7 in getting anybody out here. If that's
8 possible, Mr. Ahmad, keeping in mind I know
9 that things may come up and --

10
11 **CDC:** Yes, sir, I certainly can represent that I will
12 make every effort to give that 30-day notice.
13 And, again, absent something that comes up
14 unexpected, I think we should be able to comply
15 with that.

16
17 **Presiding Officer:** All right.

18
19 **PROS:** Thank you, sir.

20
21 **Presiding Officer:** One of the other things I have on my
22 list that we are supposed to take up today is
23 Protective Order 3. There was some e-mail
24 traffic bouncing back and forth, I know. I,

1 quite frankly, haven't had a chance to review
2 it. I believe that you all were sent an e-mail
3 from Mr. Hodges, the Assistant to the Presiding
4 Officer. There were some reservations that
5 were noted on it, I think, in a footnote. And
6 I know there was really no response from
7 anybody, so what we'll do when we get done
8 here, or at some point, I'll take a look at
9 that. Because, quite frankly, I haven't had a
10 chance to review it in its entirety. And we'll
11 resolve that, again, before we leave here
12 today. If we need an additional 8 -- I'm
13 sorry, you wanted to say something, Major

14 [REDACTED]

15
16 **PROS:** Sir, I believe we both agree at this point and
17 there should be e-mail traffic reflecting that.

18
19 **Presiding Officer:** Okay. Well, like I said, I haven't
20 had a chance to fully look at it. Before we
21 leave here today we'll resolve that. Again, if
22 we need to we'll do it here in the courtroom.
23 It appears we do not. But we'll resolve that
24 before we leave here today and I'll sign off

1 on that.

2
3 I also wanted to note for the record that RE-61
4 is the most current filings inventory. It has
5 been updated since yesterday. I believe
6 counsel for both sides have a copy of that; is
7 that correct?

8
9 **PROS:** Yes, sir.

10
11 **DC:** Yes, sir.

12
13 **Presiding Officer:** It may be possible too for you to
14 just yell out yes, sir loud enough that you
15 don't have to actually move that far. I think
16 if it's going to be a long discussion, get
17 behind the microphone, if it's going to be a
18 very quick response, I think it will be
19 satisfactory if you just make it without moving
20 over.

21
22 And I assume both counsel have seen RE-56,
23 which is the most current e-mail traffic
24 concerning the availability of Lieutenant

1 Colonel Vokey. It would appear from that that
2 Colonel Vokey is either approved or will
3 shortly be approved. I would consider that
4 then a closed matter other than the decision as
5 to whether you, Captain Merriam, stay on the
6 case. As soon as that has been decided, if you
7 would please inform both the prosecution as
8 well as myself so we know whether to keep you
9 on the list or not. As I said yesterday
10 Colonel Vokey is a very experienced trial
11 attorney, one I hold in very high regard.
12 However, that said, I think the defense in the
13 ends of justice would be well served were
14 Captain Merriam to remain on the case. And I
15 would encourage Colonel Sullivan to approve
16 that, should that be Mr. Khadr's desire.

17
18 Yesterday, Mr. Khadr, you had indicated you had
19 wanted a Canadian lawyer to represent you; is
20 that right?

21
22 **ACC:** Yes, sir.

23
24 **Presiding Officer:** And what was his name again?

1
2 *The accused conferred with counsel.*

3
4 **Presiding Officer:** That's fine, Mr. Ahmad, you can --
5 I'm going to ask you to address the issue any
6 way.

7
8 **CDC:** Sure. Yes, sir.

9
10 I believe that Mr. Khadr's wishes at this
11 point, that he had wanted to make the request
12 for a Canadian counsel of choice, and to be
13 able to make that choice in consultation with
14 Lieutenant Colonel Vokey once he is able to
15 come on board.

16
17 **Presiding Officer:** Okay. Well, what I would ask you to
18 do until Colonel Vokey gets on board is perhaps
19 you can take some preliminary steps. I have no
20 idea who this individual is, what his
21 citizenship is, bar licensing, whether he would
22 be even eligible to be approved as a civilian
23 counsel, authorized to practice before the
24 Commission. It's possible he could. But I

1 would ask that you start making those
2 preliminary inquiries to see if that's a
3 possibility. Also perhaps look at the
4 possibility of perhaps him joining the defense
5 team in some capacity whether he would be
6 willing to do that, whether that's something
7 that Mr. Khadr after consulting with Colonel
8 Vokey might want to avail themselves of.

9
10 **CDC:** Yes, sir.

11
12 **Presiding Officer:** I would note, and I do believe it to
13 be the case, although I would hope him to be
14 persuaded otherwise, that even though an
15 individual were not approved as counsel to
16 practice before the Commission, that wouldn't
17 necessarily preclude them from assisting as
18 part of the defense team in trial preparation
19 and things of that nature. Also given the
20 requirements for security of protected
21 information and things of that nature. So that
22 may be -- although not the ideal alternative,
23 but maybe something that would be of value or
24 assist the defense. And I would ask you to

1 start working that, given in particular that we
2 do have at lease some initial milestones on the
3 ground that we want to achieve. All right?
4

5 **CDC:** Yes, sir.
6

7 **Presiding Officer:** And the last thing I want to ask,
8 and I'll address this to you, Mr. Ahmad. In
9 some of the articles that I read, and there
10 were a number of them, and frankly it was a
11 voluminous number of articles. Several of
12 those seem to attribute to you a concern that
13 the accused has some chronic health problems.
14 And I have not heard anything from you or from
15 Captain Merriam that would indicate that
16 those -- whatever those problems are, I have no
17 idea what they are, would in any way interfere
18 with the accused being here and participating
19 in these proceedings.
20

21 Is that an issue that you intend to raise at
22 some point?
23

24 **CDC:** I've not had a conversation with Captain

1 Merriam about that, and I haven't had the
2 intention to do that.

3
4 **Presiding Officer:** Okay. So at this point his health
5 is not an issue for today's session?

6
7 **CDC:** That's right, sir.

8
9 **Presiding Officer:** Well, if it does become an issue,
10 what I would ask you to do is at your earliest
11 opportunity to make that known to the
12 prosecution and to me so that we can address it
13 as early on as possible. From my observations
14 he doesn't appear to be suffering in any way.
15 So if it does become a problem, let me know so
16 we can address it in a timely fashion. All
17 right?

18
19 **CDC:** Yes, sir.

20
21 **Presiding Officer:** And I think that brings us to the
22 primary purpose of our session today and that
23 is the defense motion concerning conversations
24 or contact by Colonel Davis, the Chief

1 Prosecutor in this case, with the press and
2 statements attributed to him.

3
4 Let me say at the outset that counsel were
5 given an extremely short time to respond, that
6 it's some of the best motion writing I've seen.
7 They were extremely helpful, extremely well
8 written. The documents that accompany them
9 were very very thorough. Well, with one
10 caveat, and as a function of printing, when you
11 print from an internet explorer from some of
12 those documents, it chopped off the right five
13 or six letters or something. You can all look
14 at what you sent me and see that. I don't
15 think anything is lost because of that, if it
16 were, I would of asked for them. I don't feel
17 anything is lost, but I do appreciate that. I
18 know it was a lot of work on your part and it
19 was very well done.

20
21 I also received along with those things the
22 permissions that I'd asked about as to whether
23 counsel had been given permission to address
24 the press, one of the requirements of

1 Commission law, and I have those. And I
2 appreciate you providing those to me. Those
3 have been marked as REs.

4
5 What I'd like to do now is address the defense
6 motion, which is RE-55. And I'm going to
7 assume, Mr. Ahmad, you are going to take the
8 lead on this; is that correct?

9
10 **CDC:** Yes, sir, I am.

11
12 **Presiding Officer:** All right. And I also am going to
13 assume that RE-53, which is the materials that
14 you provided to the Presiding Officer
15 yesterday, you want me to consider along with
16 the other materials you provided?

17
18 **CDC:** I do, sir. And I realized that there -- I'd
19 like to make a correct in the matter of errata
20 in the brief because I referred to --

21
22 **Presiding Officer:** I don't use words like that.

23
24 **CDC:** I'm sorry it's a minor correction in the brief

1 that we submitted on the motion. Throughout it
2 I refer to it as Review Exhibit 54, and that
3 should be 53, which is the packet that was
4 submitted yesterday.

5
6 **Presiding Officer:** All right. I appreciate that.

7
8 **CDC:** I don't know if you want me to submit a
9 corrected motion or if this is enough for the
10 record?

11
12 **Presiding Officer:** No, that's fine. Is it also your
13 desire that I consider your arguments that you
14 made yesterday?

15
16 **CDC:** Yes, sir.

17
18 **Presiding Officer:** All right. And I will do so --
19 well, any objection to that? Who is going to
20 take this for the government?

21
22 **APROS:** Your Honor, I will, sir.

23
24 **Presiding Officer:** All right. Any objection to that?

1
2 **APROS:** No objection, Your Honor.

3
4 **Presiding Officer:** I will consider all of those
5 documents along with the argument you made
6 yesterday.

7
8 And I have RE-60, which is the government's
9 response brief. Again, with a number of
10 documents attached to that and it's your desire
11 Lieutenant -- it's [REDACTED] right.

12
13 **APROS:** Yes, Your Honor.

14
15 **Presiding Officer:** Any objection to my considering
16 that?

17
18 **APROS:** Could you repeat what it is you are
19 considering, sir? I apologize.

20
21 **Presiding Officer:** Your brief with all your
22 attachments.

23
24 **APROS:** Yes, sir, I would appreciate it if you consider

1 that.

2

3 **Presiding Officer:** You want me to consider that?

4

5 **APROS:** Yes, sir.

6

7 **Presiding Officer:** All right. Any objection to my
8 considering that, Mr. Ahmad?

9

10 **CDC:** No, sir.

11

12 **Presiding Officer:** And I will consider that. You've
13 indicated you wanted to make oral argument.

14

15 **CDC:** Yes, sir.

16

17 **Presiding Officer:** I heard a lot of oral argument
18 yesterday. I've read, as I indicated, a very
19 well written brief with extensive argument in
20 it from both you and from the government
21 counsel. What I'm going to do is I'm going to
22 allow you to argue but only matters that are
23 not otherwise contained in your brief or if you
24 want to rebut something that's contained in the

1 government's brief I'll allow you to address
2 that. But I would ask you to be brief if it's,
3 otherwise, simply tit-for-tat on your brief
4 their responding to your brief.

5
6 **CDC:** Yes, sir. Yes, my intention is to rest
7 primarily on our brief and only to address
8 matters that arose in light of the government's
9 responsive brief.

10
11 The first point that I'd like to raise, sir, is
12 that as I read the government's brief, there's
13 a large gap in it. In that, in our motion we
14 made two, what I saw to be two, primary points.
15 One was based on Rule 3.6 of various rules of
16 conduct.

17
18 **Presiding Officer:** Let me stop you right there.

19
20 **CDC:** Yes.

21
22 **Presiding Officer:** I want to -- it seems to me, as I
23 read all of those rules, that they are, if not
24 identical, extremely close and that all of them

1 have a provision that essentially bars counsel,
2 not prosecutors, not the defense counsel, not
3 respondent's counsel, but counsel appearing
4 before a tribunal of any sort, be it
5 court-martial, civil court, federal court, or
6 military Commission, which I think qualifies,
7 from making extrajudicial statements that a
8 reasonable person would believe would prejudice
9 the other party; is that a fair statement?

10
11 **CDC:** I would modify the last part in terms of the
12 subject of the prejudice. I think it could be
13 the other party, but it could also be in the
14 fairness of the proceeding.

15
16 **Presiding Officer:** Exactly. Okay. That's --

17
18 **CDC:** Otherwise I agree with that characterization,
19 sir.

20
21 **Presiding Officer:** And that prohibition applies to both
22 sides of the dispute.

23
24 **CDC:** That's correct, sir.

1
2 **Presiding Officer:** You would agree with that?

3
4 **CDC:** May I add a caveat?

5
6 **Presiding Officer:** Yes.

7
8 **CDC:** Which is, and I won't belabor this because I
9 did raise it in the brief, but I do believe
10 that particularly the comments to Rule 3.8 of
11 the Rules of the District of Columbia makes
12 clear that the rules, even though they are as
13 they are written applicable to all lawyers, may
14 be applicable in greater sense to prosecution
15 than to the defense.

16
17 **Presiding Officer:** Okay. Well, I'll get to that point
18 in just a minute.

19
20 **CDC:** Yes, sir.

21
22 **Presiding Officer:** Because I think that most, if not
23 all of the rules do, and I think you said this
24 yesterday, I believe I agreed with you in a

1 general since, that prosecutors do enjoy a
2 heightened responsibility. It's not, as I said
3 yesterday, to get a conviction. It is not to
4 put somebody in jail. It is to seek justice.

5
6 **CDC:** Yes, sir.

7
8 **Presiding Officer:** I think we are in agreement there.

9
10 **CDC:** I believe we are, sir.

11
12 **Presiding Officer:** But my more basic point is that you
13 would agree that all of the particular codes
14 that you cited to have similar provisions that
15 place the responsibility on the attorneys
16 concerning extrajudicial comments as well as
17 the heightened responsibility on the
18 prosecutor.

19
20 **CDC:** Yes. I agree with that. And, again, with
21 respect to the rules, for example, 3.6 which
22 does not speak to prosecutors, it just speaks
23 to attorneys.

1 **Presiding Officer:** Right.

2
3 **CDC:** The only slight difference I would draw is that
4 I do believe the commentary on the rules,
5 particularly in the District of Columbia may --
6 suggest very strongly that, for example 3.6 --

7
8 **Presiding Officer:** Hold on just a minute.

9
10 **CDC:** Yes.

11
12 **Presiding Officer:** I'm not sure what's going on with
13 the PA system, but he's wiggling in and out on
14 me. It's very distracting. Is that something
15 we can fix? I don't know who is responsible.
16 I've got people all over the courtroom. Can we
17 fix that? I don't know if you can do it with
18 your table or something, he's wiggling in and
19 out.

20
21 **CDC:** I certainly don't mean to wig out.

22
23 **Presiding Officer:** I'm sure you don't. All right.
24 Maybe it's not something we can address right

1 now, but maybe we can address it.

2
3 **CDC:** I can certainly try to stay closer to the
4 microphone.

5
6 **Presiding Officer:** I don't think -- I don't see it as
7 something you are doing. It seems like
8 something to do with the audio.

9
10 Go ahead.

11
12 **CDC:** Okay. Well, sir, again, the commentary to Rule
13 3.8 of the Rules of Professional Conduct for
14 the District of Columbia includes language
15 where it suggests very strongly that even if
16 there was a rule that applies generally to all
17 attorneys, that rule, that the ability under
18 one of those rules of general applicability to
19 do something -- for example, pretrial
20 extrajudicial statements -- may be less
21 available to a prosecutor than to another
22 lawyer. That's within the commentary I can
23 provide you a citation in the packet of RE-53
24 that was put in yesterday.

1
2 **Presiding Officer:** That's fine. I've read it and I
3 understand your point.
4

5 **CDC:** But beyond that, I do agree with your general
6 principle that, for example, 3.6 certainly is
7 applicable to defense counsel and to the
8 prosecution. The difference I would draw is I
9 don't believe they are necessarily equally
10 applicable.
11

12 **Presiding Officer:** All right. You would agree also
13 that within all of the codes that you cited
14 there's an exception to the rule where a party
15 to a dispute, to include a prosecutor, has the
16 right to address extrajudicial -- or make
17 extrajudicial comments in order to address a
18 circumstance where there is some kind of an
19 inflammatory, misleading, or otherwise
20 problematic thing out there in the public that
21 impacts his ability to be a prosecutor, defense
22 counsel, civil litigation, whatever, to obtain
23 a fair and impartial trial for that individual
24 or that attorney's client.

1
2 **CDC:** Respectfully, sir, I think that your
3 characterization is overbroad in a few
4 different ways.

5
6 **Presiding Officer:** Okay.

7
8 **CDC:** First, I certainly do agree that there's a
9 provision within several of the codes we have
10 cited that permits a kind of rebuttal by a
11 lawyer. But I don't believe -- and I would
12 like to have the opportunity to check -- I
13 don't believe that that is part of -- that is
14 part of Rule 3.6 of the Rule of North Carolina.
15 I believe it's 3.6C in the rules of North
16 Carolina. I don't believe that there is an
17 analogous provision in 3.6 of the District of
18 Columbia. So it's not -- and so what that
19 means, sir -- and I think this is one of the
20 things that makes this motion a bit
21 complicated -- is I agree with your statement
22 at the outset that we have several different
23 bodies, sources of Rules of Professional
24 Conduct that are applicable, and they are

1 roughly equivalent.

2
3 But there are, in fact, some important
4 distinctions between them. Having said that,
5 the last point in which I think that your
6 characterization is overbroad, is that looking
7 for example at 3.6C of the Rules of North
8 Carolina, what it protects against is it allows
9 a lawyer to make a statement, an extrajudicial
10 statement, when that lawyer reasonably believes
11 it is required to protect a client against
12 substantial undue prejudicial effect of recent
13 publicity not initiated by the lawyer or the
14 lawyer's client. I believe that that language
15 that I just read, sir, is narrower than the
16 characterization that you made. It's not just
17 any type of prejudice. It's not just anything
18 that's inflammatory. It has to be keyed to a
19 particular form of undue judicial prejudicial
20 effect to a client. It can't just be out there
21 in the world, we don't like that this was said
22 or we think that's inflammatory.

23
24 **Presiding Officer:** Let me ask you a question, then. Do

1 you dispute that the prosecutors have a client
2 here?

3

4 **CDC:** I don't dispute that, sir.

5

6 **Presiding Officer:** Would you agree that the United
7 States Government is their client?

8

9 **CDC:** I do agree to that, sir, yes.

10

11 **Presiding Officer:** Specifically, though, under the D.C.
12 code, you do not believe there's an exception
13 that allows a prosecutor to address this
14 concern for something that's in the public
15 arena that's prejudicing his client's ability
16 to get a fair trial?

17

18 **CDC:** That's correct, sir. In my --

19

20 **Presiding Officer:** Okay.

21

22 **CDC:** That's my understanding of 3.6 of the D.C. rules.

23

24 **Presiding Officer:** Okay. Please continue.

1
2 **CDC:** Thank you, sir. I think that your raising of
3 3.6 is important. And the prosecution, in
4 their brief, certainly places their focus on
5 3.6. I think that's appropriate. It's quite
6 true that as defense, and I'll say it for
7 myself, since I am cited to several times --
8 the comments of mine are cited to several times
9 in the prosecution's brief. I certainly am
10 governed by 3.6 and my case is in the District
11 of Columbia and in New York because that's
12 where I am barred. And I would represent that
13 I believe --

14
15 **Presiding Officer:** That's not to say you are barred
16 from Columbia and New York. You are a member
17 of the bar of Columbia and New York?

18
19 **CDC:** That's right, sir. They may want to bar me,
20 but so far that hasn't happened. I believe
21 that my comments are within that scope. Now
22 the problem that I see in the government's
23 brief is that they've spent quite a bit of time
24 on 3.6 and I would like to come back to that

1 because I don't think that they've addressed it
2 with sufficient attention to the differences
3 among the rules. But even if they did, even if
4 I were to concede that their analysis of 3.6 is
5 correct, nowhere in their brief, sir, do they
6 make mention of Rule 3.8. Three point eight
7 exists in three different relevant bodies of
8 Rules of Professional Conduct, the District of
9 Columbia, North Carolina, and the naval rules.
10 And --

11
12 **Presiding Officer:** I think there's -- I believe there's
13 an equivalent under the Air Force rule. They
14 don't number theirs the same, but I think
15 there's an equivalent provision under the Air
16 Force Rules.

17
18 **CDC:** I believe that there is. In terms of specific
19 language that we relied upon in our brief, I
20 don't believe that's there but I certainly
21 could be wrong on that. If I would -- because
22 I'm not sure, I'm going to limit my discussion
23 to D.C., North Carolina and the Naval Rules.
24 And what -- at the outset I think what's

1 important to recognize is what the name of that
2 rule is.

3
4 In D.C. that rule is titled, "Special
5 Responsibilities of a Prosecutor." In North
6 Carolina, that rule is entitled, "Special
7 Responsibilities of a Prosecutor." In the
8 Naval rules, that rule is entitled, "Special
9 Responsibilities of a Trial Counsel and other
10 Government Counsel." My understanding is that
11 trial counsel in the Naval system is the
12 prosecutor.

13
14 **Presiding Officer:** Okay. I'm stopping you **here** because
15 I've read all of this. Okay. So I would like
16 for you to get to the specific point.

17
18 **CDC:** Yes, sir. The point is that none of this is
19 mentioned in the government's brief. The vast
20 majority of our brief is committed to 3.8,
21 because 3.8 deals with not a generic rule of
22 professional conduct, that as you noted with
23 respect to 3.6, applies to the defense and to
24 the prosecution. And, again, I would note that

1 I don't think they apply equally. But the
2 government never even mentions 3.8, even though
3 that is what we place a great deal of emphasis
4 on. And it arises in three different relevant
5 sources of professional conduct.

6
7 Now, in my view, sir, the absence of attention
8 to Rule 3.8 from these different bodies of law,
9 by the government, is reflective of the problem
10 in the Chief Prosecutor's statements at the
11 January 10th press conference. Because there
12 too there was, in our view, an insufficient
13 attention paid to Rule 3.8.

14
15 **Presiding Officer:** I've got to stop you for a minute.

16
17 **CDC:** Yes, sir.

18
19 **Presiding Officer:** It's just something that's occurred
20 to me, Lieutenant [REDACTED]

21
22 **APROS:** Yes, sir?

23
24 **Presiding Officer:** Somebody approached me before we

1 came in here and asked me something about a --
2 this actual interview that you were going to
3 play, the interview itself during this session.
4 Is that a change of plan, because -- and maybe
5 I just neglected to ask you if there was
6 anything else you wanted me to consider.

7
8 **APROS:** Sir, it's my understanding that the video
9 should be attached to our motion as evidence.

10
11 **Presiding Officer:** I don't have it.

12
13 **APROS:** My understanding is that you were supposed to
14 receive it.

15
16 **Presiding Officer:** I was told that it was going to be
17 played in here and it was a Major, I don't know
18 who he was -- a Major approached me on behalf
19 of -- I think he was one of the technical
20 people and said that it was going to be played.
21 I apologize, Mr. Ahmad.

22
23 **CDC:** That's all right, sir.

1 **APROS:** Your Honor, the understanding of the government
2 was that we were going to make arrangements to
3 have it played. If you, sir, want it played,
4 our position was if you wanted --

5
6 **Presiding Officer:** If you want me to consider it, you
7 are going to have to play it. I haven't seen
8 the video. And I don't have it attached to
9 anything that I was given.

10
11 **APROS:** Right, sir. The understanding -- our
12 understanding -- the way I had foreseen it, I
13 may have foreseen this incorrectly, sir. But
14 the way I had foreseen it is after argument
15 you'd probably go back and deliberate and I
16 wanted you to have the video to review while
17 you deliberate before making your decision, or
18 we had it set up in case you wished it to be
19 played. It's not our -- it was not -- we
20 weren't planning on playing the video in open
21 court.

22
23 **Presiding Officer:** That's what I was told you were
24 planning. Let me ask you, Mr. Ahmad. If I'm

1 provided a CD or something like that, I assume
2 it's going to be a CD with that -- apparently a
3 video with the audio of the interview where
4 Colonel Davis addressed the press on the 10th
5 would you have any objection to my just viewing
6 that in chambers? Or do you want the played
7 here in open court? Or what's your preference?
8

9 **CDC:** No, sir, I have no objection to you viewing it
10 in chambers.
11

12 **Presiding Officer:** All right. Then we'll take -- at
13 some point -- when we get, I guess I would like
14 to see the video since it seems to be the
15 cornerstone of the arguments here or the
16 evidence here. I'd like to see the video
17 before counsel complete their arguments. I
18 think it would be helpful to know exactly what
19 said.
20

21 **APROS:** The government has no objection to that, Your
22 Honor.
23

24 **Presiding Officer:** And Mr. Ahmad seems to be getting

1 into that right now. And you had a discussion
2 a moment ago with your client.

3
4 **CDC:** Sir, if I could have just a moment with my co-
5 counsel.

6
7 **Presiding Officer:** You may.

8
9 *The Defense Counsel confer.*

10
11 **Presiding Officer:** Mr. Ahmad?

12
13 **CDC:** Sir, I -- one question I have is: If the video
14 or the DVD is of the entire press conference?

15
16 **Presiding Officer:** I don't know what it is.

17
18 **CDC:** Because we were provided -- the defense was
19 provided with a copy of a DVD, I think, around
20 noon today. And it took until about 2:30
21 before we were able to get technological
22 ability to view it. As a result, we saw some
23 clips, and Captain Merriam just represented to
24 me that he believed that this was a video that

1 was broken up into clips and wasn't necessarily
2 the full sweep. That's -- I don't know if the
3 government's had an opportunity to view it in
4 its entirety, if they can comment on that.

5
6 **Presiding Officer:** Lieutenant [REDACTED]?

7
8 **APROS:** Your Honor, with your permission, may I
9 briefly speak with the Chief Prosecutor?

10
11 **Presiding Officer:** Is this Colonel Davis?

12
13 **APROS:** Yes, sir.

14
15 **Presiding Officer:** All right, go ahead.

16
17 *Assistant trial counsel conferred with the Chief*
18 *Prosecutor.*

19
20 **APROS:** Your Honor, I wish to --

21
22 **Presiding Officer:** I'm sorry. Go ahead.

23
24 **APROS:** I just spoke with my Chief Prosecutor, because

1 he watched the video on the video cassette
2 tape. And we know for sure it's about a hour
3 or so long. It is entirely complete. It is
4 not broken up. My understanding is the DVD is
5 supposed to be the same, but I have not had a
6 chance to review it to ensure that it is. But
7 we do know for sure, and it was our intent
8 that you got the entire press conference,
9 unedited with everything in there and that is
10 on the VHS tape, sir.

11
12 **Presiding Officer:** All right, so what do you guys want
13 me to do? Do you want me to watch the video
14 or do you want me to watch the DVD, when I say
15 video, the VHS. Do you want me to watch the
16 DVD? Do you all want to go watch it and then
17 come back and tell me what you want me to
18 watch? Apparently, you haven't seen it
19 yourself.

20
21 **APROS:** Your Honor, I believe the -- hopefully the
22 simple answer is you could watch the VHS tape,
23 the video, since we do know for a fact that it
24 is complete.

1
2 **Presiding Officer:** Mr. Ahmad? Look we are going to
3 take as long as we need here.
4

5 **CDC:** Yes, sir.
6

7 **Presiding Officer:** If you all think it's important to
8 your respective positions, then let's take a
9 recess, go sit down together, silently watch
10 the videotape, watch the DVD, whatever, and
11 then come back and tell me or show me what you
12 want to show me. I mean I'm not -- you are
13 the counsel here. You need to be the ones
14 figuring out what the evidence is. If you
15 haven't seen it, you need to see it before you
16 can make a decision it seems to me.
17

18 Lieutenant, if you are not sure what you got
19 there, you need to go figure out what you got
20 and then share that with the defense. As I
21 said, counsel have been tasked to do something
22 quite difficult in a very short period of
23 time. But we will take the time necessary so
24 that you can properly represent your clients

1 and I can make an appropriate decision. The
2 stakes are too high.

3
4 So I guess with that said, let's take a
5 recess, you all figure out what you got. And
6 then when you are ready, come back to me and
7 if we're going to view the DVD in here, fine,
8 if you are going to give it to me to go watch
9 in chambers, fine, but we will at least know
10 what we intend to do. All right.

11
12 The Court's in recess.

13
14 *The Commission hearing recessed at 1611,*
15 *12 January 2006.*

16
17 *The Commission hearing was called to order at 1641,*
18 *12 January 2006.*

19
20 **Presiding Officer:** The court will come to order. All
21 those present when we recessed are again
22 present. I understand that counsel have
23 worked out whatever technical difficulties
24 there are and you want to go ahead and play

1 the video here in open court; is that correct?

2

3 **APROS:** Yes, Your Honor.

4

5 **Presiding Officer:** And we are ready to do that now?

6

7 Before you start, my intent is that the court
8 reporter is not going to try to transcribe the
9 audio portion of this videotape. The press
10 conferences and things I've seen, it would be
11 virtually impossible. What I will direct is
12 that she indicate in her record when the
13 videotape began to play and when it stopped.
14 There will be no discussion on the record
15 until it is complete. And then the video --
16 now we are looking at that DVD, correct?

17

18 **APROS:** Yes, Your Honor.

19

20 **Presiding Officer:** When this DVD is complete, it will
21 be attached to the record as a review exhibit.

22

23 **PROS:** It's actually, it's the VHS copy. There are
24 two clips that we put on the computer. The

1 DVD, because of the software we have, there
2 were complications running it on our
3 computers. So what we will see is an exact
4 copy of the VHS video. It's broke out in --
5

6 **Presiding Officer:** What are we going to attach to the
7 record.
8

9 **PROS:** The VHS.
10

11 **Presiding Officer:** Is that all right with the defense?

12 It seems to me it would be better to reduce it
13 to a DVD. But it would be more convenient for
14 the parties because when you give the defense
15 a copy of the record, you are going to give
16 them a copy of the VHS tape, which is rather
17 bulky and difficult.
18

19 **PROS:** We have a DVD as well, sir. The only problem
20 is the -- when you view it you have to have a
21 certain computer program to view it and we can
22 note that and add that to the record as well.
23

24 **Presiding Officer:** Any problem with that, Mr. Ahmad?

1
2 **CDC:** Sir, I would just suggest that I think for the
3 purposes of viewing this here and now, we have
4 the means to do it and that maybe we can just
5 agree that a DVD that works on a wide range of
6 computers will be obtained and that will
7 become part of the record.
8

9 **Presiding Officer:** All right. Let's do that and I will
10 allow counsel to figure out and I'll give the
11 prosecutor the responsibility to make that
12 happen. When you get that, provide it to Mr.
13 Ahmad or Captain Merriam for their review and
14 approval. If it does become an issue, raise
15 it to me and I will take care of it. All
16 right. Let's go ahead and play the video.
17

18 *The video started at 1644 hours.*
19

20 **APROS:** Your Honor, for the record, this is split up
21 into two files. The first file has stopped
22 and Major [REDACTED] is now going to play the
23 second.
24

1 *The first file of the video stopped at 1727 hours.*

3 *The video stopped at 1737 hours.*

5 **Presiding Officer:** All right. We've heard the -- and
6 watch the video of the press conference. Let
7 me just make a note that at times there was
8 difficulty hearing, not the speaker, but the
9 questioner during, at least, the audio that I
10 had here.

12 Lieutenant, is there anything else that you
13 want the Presiding Officer to consider?

15 **APROS:** No, no. If I may, I know I mentioned this in
16 the middle. I apologize if it was at an
17 inappropriate time. But I just wanted the
18 record to reflect it was in two files. And it
19 had broken up, and we had played the second
20 file.

22 **Presiding Officer:** All right. Mr. Ahmad, and again I
23 apologize for stopping you in the middle of
24 your argument. With that said, what I would

1 ask you to do is not to retrench everything
2 we've talked about and not to repeat
3 everything that's in your brief. I have read
4 the brief as well as all the attached
5 documents, to include the various rules from
6 the various jurisdictions that you provided to
7 the Commission.

8
9 **CDC:** Yes, sir. I -- it is my intention to only
10 address things that have not yet been
11 addressed and to seek to clarify based on the
12 conversation we've already had to date today.
13 In light of what we've just seen in the tape,
14 what I want suggest -- what I'd like to do is
15 return to the conversation we were having
16 about Rule 3.6 and 3.8.

17
18 And there's several points I'd like to make
19 here. The first I'd like to make, sir, is
20 that as an initial matter, of all the relevant
21 codes that are applicable here, the D.C.
22 rules, both 3.6 and 3.8, are the most
23 protective of defendants and the most
24 restrictive of prosecutors.

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The government hasn't disputed the applicability of the D.C. rules to the Chief Prosecutor. So this, at a very minimum, is the standard that needs to be applied in looking at the statements of the Chief Prosecutor in light of the motion that we've made.

The second thing I'd like to do, sir, is to draw a distinction between 3.6 and 3.8 based not on whether it applies to all lawyers or only to the prosecution, but to look at what the purpose of each rule is. I think that's really important in understanding then how this analysis ought to be done in considering whether these statements by the Chief Prosecutor were appropriate or not, whether they violated the rules or not.

Three point six is about the effect of pretrial publicity on the impartiality of a judge or jury or, here in the Commission process, a member. And let me just add one

1 note here that since the D.C. rules are the
2 most protective of the defendant, my
3 references here are, unless I state otherwise,
4 to the D.C. rules.

5
6 Three point eight, in contrast, is not about
7 the impartiality of the judge or the jurors or
8 here, the Presiding Officer and the members.
9 It has an entirely different concern. Three
10 point eight is about reputation concerns. It
11 protects against statements of the prosecutor
12 that heighten condemnation of the accused.
13 There's no intent requirement. It's what
14 effect those statements have.

15
16 If the statements of the prosecutor have the
17 effect of increasing the condemnation or the
18 public opprobrium that the defendant or the
19 accused here would have in light those
20 comments, that's a violation of the rule. So
21 there's two ways then, two ways to slice, I
22 think, 3.6 and 3.8. We talked about the first
23 way, which is to whom does it apply? Three
24 point six, to everybody; 3.8, only to

1 prosecutors.

2
3 This second way that I'm putting forward is
4 that they have entirely different concerns.
5 Fairness of the process; and in particular,
6 the partiality of the legal and fact finders
7 versus reputation concerns. Three point
8 eight, sir, I want to suggest is the gateway
9 of analysis to what is before you today. This
10 is for two reasons. First, 3.8 is the only
11 rule that applies specifically to prosecutors.
12 There's no other rule that does it. I don't
13 believe the government can just ignore it.

14
15 In their brief as I read it, there was no
16 mention. They didn't engage in that argument
17 at all. The second reason that I think that
18 3.8 is the gateway here is that, as I noted
19 previously, the comment to 3.8, in the rules
20 of the District of Columbia, notes that for
21 lawyers who are governed by the D.C. rules --
22 and again, unless the government says
23 otherwise, it seems to me that is the Chief
24 Prosecutor -- other rules beyond 3.8 may not

1 be as fully available. Conduct permissible
2 under other rules other than 3.8 may not be as
3 fully permissible -- available to the
4 prosecutor as they are to other lawyers. The
5 reason being that 3.8 expresses both a
6 specific rule with regard to prosecutors and
7 reflects a larger structural concern that
8 prosecutors and defense lawyers play a
9 different role in ways that we've talked about
10 before, and I've briefed, so I won't go into
11 that in greater detail.

12
13 The point, however, is that one cannot, I
14 believe, under the rules of the D.C. Rules of
15 Professional Conduct, treat the
16 responsibilities and look at what is
17 permissible conduct of prosecutor and defense
18 lawyer with parity. There is not parity. The
19 rules do not reflect parity. And the broader
20 structure of our system of law does not
21 reflect that parity. So when we look at the
22 statements that were made on the video by the
23 Chief Prosecutor, I enumerated some of those
24 in our brief.

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24

There are others that I didn't have the benefit of hearing without the videotape. I counted the Chief Prosecutor referring to detainees at Guantanamo Bay as terrorists six times. I counted him saying at least three times and possibly four times that he believes that Omar is guilty; Mr. Khadr is guilty. That's pronouncing guilt, sir.

I don't think that's permissible. I think beyond that it certainly shows that this is going to have the effect of increasing the amount of public condemnation that Mr. Khadr will face. I want to add, sir, that, as you've seen in the exhibits, the story about the comments of the Chief Prosecutor have gone all over and particularly all over Canada.

Presiding Officer: Let's move on from that point.

CDC: All right.

Presiding Officer: I don't think there's an issue that

1 there has been a very limited distribution of
2 the comments of either Colonel Davis or
3 yourself.

4
5 **CDC:** Well, sir, I hear from both you and from the
6 government.

7
8 **Presiding Officer:** Well, let me -- I'm going to stop
9 you for just a minute. Because as -- I don't
10 think the discussion focuses entirely -- I
11 believe the government's brief focused
12 entirely on the conduct of the defense
13 counsel, primarily yourself.

14
15 **CDC:** Yes, sir.

16
17 **Presiding Officer:** I don't think that the rules, with
18 the exception possibly of the D.C. Circuit
19 Rules, require that. What they appear to
20 address is when that information is out there,
21 that got out there, that prejudices that
22 particular covered attorney, in this case, the
23 prosecution's client or the United States
24 Government, that it prejudices its case. And

1 it's not, the application of the rule doesn't
2 seem to me to be dependent upon conduct by the
3 defense counsel in that case.

4
5 It can be -- and I think one of the rules --
6 and I don't recall which one it is just now --
7 specifically refers to actions by third
8 parties. There's a lot of third parties
9 involved here, I believe. So I don't know
10 that it -- in deciding the issue, we focus
11 entirely on the conduct of yourself. To my
12 knowledge, Captain Merriam has not spoken to
13 the press. I could be wrong, but I'm not
14 aware of anything where he has addressed the
15 press on this issue or made any releases other
16 than here in court.

17
18 So I don't -- but I don't think it focuses
19 just on your actions. I think the bigger
20 issue -- at least as I read the various
21 sections is with the exception of the D.C.
22 Circuit, it is the concern that a party has
23 been disadvantaged to the point where they are
24 denied a fair trial and steps are needed to be

1 taken to try to reduce the impact of that to
2 try to rebalance the scales, if you will.

3
4 Continue, please.

5
6 **CDC:** Yes, sir. I believe that, as we were
7 discussing earlier, Rule 3.6c, of the North
8 Carolina rule, largely does or permits what
9 you've described in that if there is
10 substantial undue prejudicial effect to the
11 interests of a client, that it does permit a
12 lawyer, prosecutor, or defense to speak and
13 make extrajudicial comments. I do think,
14 however, sir, that one cannot get to 3.6
15 before going through the gateway of 3.8.

16
17 And as I noted parenthetically before, I'd
18 like just to expand on briefly, the comment to
19 3.8 in the D.C. rules says that this may --
20 you might not as a prosecutor have available
21 to you the full breadth of conduct available
22 to other lawyers under rules. Sir, if you
23 look at that rule --

1 **Presiding Officer:** You're referring right now to North
2 Carolina; correct?

3
4 **CDC:** No, sir. I'm sorry.

5
6 **Presiding Officer:** I thought you went to North
7 Carolina.

8
9 **DC:** I did go to North Carolina. I moved back to
10 D.C., sir. I'm sorry, sir.

11
12 **Presiding Officer:** Because North Carolina specifically
13 makes an exception that allows the prosecutor,
14 and it's under 3.8 and refers back to 3.6C, it
15 specifically allows the prosecutor to take
16 those remediation steps to counterbalance the
17 undue prejudice for their client.

18
19 And I believe the Air Force Code has a similar
20 provision, as does the Navy Code, all of which
21 have that heightened requirement for the
22 prosecution, and all of them which recognize
23 where there are circumstances when the
24 prosecution is not bound by that. And, in

1 fact, the D.C. Code -- and I believe it's in
2 the comment -- does allow the prosecution,
3 which perhaps does focus on yourself and your
4 actions, in the way of statements, that
5 indicates where there's been an extrajudicial
6 allegation by the defense of unprofessional or
7 unlawful conduct on the part of the
8 prosecution's office.

9
10 And I tend to think that when we talk about
11 the prosecution, we throw into that, not only
12 the actual prosecutors, but the people that
13 support them, and tend to roll in the entire
14 governmental body that they represent. So one
15 can argue that even under the D.C. provision,
16 3.8, there is an exception that allows the
17 prosecution to respond under circumstances
18 where there's been an allegation by the
19 defense.

20
21 It limits it. It doesn't have that third
22 party part of it, I don't think. At least not
23 in what was provided to me. But it does allow
24 for the prosecution to respond when there's an

1 allegation of unlawful or unprofessional
2 conduct by the prosecutor.

3
4 **CDC:** Sir, can I ask you where you're referring to
5 about the unlawful -- of the allegation of
6 unlawful conduct by the prosecution?

7
8 **Presiding Officer:** You're talking about in the D.C.
9 Code?

10
11 **CDC:** Yes, sir.

12
13 **Presiding Officer:** It looks like page 7 of RE-53, the
14 second page dealing with Rule 3.8. It's clear
15 down at the bottom. Actually, that appears to
16 be the last sentence. And I quote, "Also, a
17 prosecutor should be free to respond in so far
18 as necessary to any extrajudicial allegations
19 by the defense of unprofessional or unlawful
20 conduct on the part of the prosecutor's
21 office."

22
23 And when one stands up and says that members
24 of the United States Government have tortured

1 an individual for whatever reason, and the
2 prosecution intends to offer, I would presume,
3 that torture information they obtained, that
4 that, to me, would be unlawful or
5 unprofessional conduct that could be
6 attributed back to the prosecutor because they
7 are now, at least, implicated because they're
8 going to make use of that.

9
10 **CDC:** Sir, respectfully, I think that is driving too
11 large a hole into the language that is at the
12 end of that rule. And I'd like to come back
13 to that by looking at what precedes it
14 immediately in comment two. This is on page 7
15 of Exhibit 53.

16
17 **Presiding Officer:** Talking about page 7?

18
19 **CDC:** Yes. Just above the paragraph to which you
20 were referring, sir.

21
22 **Presiding Officer:** All right.

23
24 **CDC:** The point here, sir, is that what I believe

1 3.8 does is that not only does it say as a
2 general matter that -- and here I'll quote --
3 "Because of the power and visibility of a
4 prosecutor, the prosecutor's compliance with
5 these rules and recognition of the need to
6 refrain, even from some actions technically
7 allowed to other lawyers under the rules, may
8 in certain instances be of special
9 importance."

10
11 What it then goes on to do, sir, is it
12 specifically references 3.6 regarding
13 extrajudicial statements.

14
15 **Presiding Officer:** I don't question that. I don't
16 question that there is a limitation. What you
17 seem to be arguing is that even in those
18 circumstances where a -- for example, a
19 defense counsel has alleged unprofessional or
20 unlawful conduct on the part of the
21 prosecution in an extrajudicial statement that
22 the prosecution's hands are thereby tied, and
23 he cannot respond to that.

1 And I don't believe that's what the rule
2 requires either in D.C. and specifically not
3 in the other jurisdictions you've provided me
4 the various codes for, that they specifically
5 allow the attorneys that are representing the
6 U.S. Government in this case to respond to
7 inflammatory or prejudicial information that's
8 being released and is currently being
9 publicized that denies their client, in this
10 case, the U.S. Government, a fair and
11 impartial hearing.

12
13 And allegations that a procedure is a sham,
14 that it is unfair, that the accused will be
15 denied a fair and impartial trial are, I would
16 submit, highly prejudicial comments. I think
17 in our case, however, because there is a
18 prophylactic order that is in effect, that the
19 impact of both your statements, hopefully, as
20 well as Colonel Davis' statements would be
21 diminutive. And quite frankly, that's my
22 concern, that the parties be able to have a
23 fair and impartial trial here, that the
24 members that come and sit in this hearing room

1 do so without bringing a lot of baggage with
2 them because of having heard allegations of
3 torture, allegations of undue pressure being
4 placed on an individual, as well as the
5 opinions, personal opinions, of the prosecutor
6 as to guilt or innocence of the accused.

7
8 As I said yesterday, the issue of guilt or
9 innocence should be decided here in the
10 courtroom, not in the forum of public
11 discussion. It should not be decided in the
12 press. And the articles that I was provided
13 would indicate that there's been a tremendous
14 effort to influence that. The only effort I'm
15 aware of where the government has responded is
16 Colonel Davis' press conference two days ago.

17
18 **CDC:** Sir, if I may respond, a couple of points.
19 First, looking at the government's own
20 argument about what they say they are
21 responding to -- this is in the prosecution's
22 response on Page 5, Paragraph 9, where they
23 say that much of the --
24

1 **Presiding Officer:** Please, let me -- give me a minute.

2
3 **CDC:** Sure.

4
5 **Presiding Officer:** The prosecution's response page?

6
7 **CDC:** Page 5, Paragraph 9, sir.

8
9 **Presiding Officer:** All right.

10
11 **CDC:** Here, the government says through much of the
12 press conference, the Chief Prosecutor
13 confined his comments specifically in rebuttal
14 to press accounts largely manifested by the
15 defense. For example, the Chief Prosecutor's
16 comment, "It's my belief that the evidence
17 will show the accused is indeed a terrorist"
18 was in direct response to numerous accounts
19 describing the accused as a fresh-faced
20 teenager in the full bloom of adolescence.

21
22 Let me stop there, sir. It's not clear to me
23 what injury is done, what substantial, undue
24 prejudicial effect is done to the government

1 of the United States of America by someone in
2 a newspaper writing that Mr. Khadr is a
3 fresh-faced teenager in the full bloom of
4 adolescence. Where is the substantial undue
5 prejudicial effect to the United States
6 Government?

7
8 In answering that question, sir, I believe we
9 have to take into account the disparity
10 between the prosecution and the defense which
11 the *Fletcher* case that we cite talks about.
12 The United States --

13
14 **Presiding Officer:** Let --

15
16 **CDC:** Yes, sir.

17
18 **Presiding Officer:** Is it your opinion that it has to be
19 a tit-for-tat sort of analogy that we have to
20 look at each and every individual comment
21 during the press conference as opposed to the
22 comments taken as a whole, given the amount of
23 adverse pretrial publicity that's been
24 generated, let's say, that's been favorable to

1 Mr. Khadr, or are we going to, as I said, take
2 one line, he says this. Where do we find that
3 that counterbalances? Or are we going to look
4 at all of his comments taken as a whole?
5

6 **CDC:** Sir, let me try to respond to that in two
7 ways. First, is this is the government's
8 argument. I would assume that the government
9 sought to put forth their best argument. They
10 say that --
11

12 **Presiding Officer:** Well, you've taken one paragraph out
13 of a --
14

15 **CDC:** Sir, I'm prepared to continue with paragraphs
16 because I think their next example is equally
17 --
18

19 **Presiding Officer:** But you've taken one paragraph out
20 of a --
21

22 **CDC:** Well, sir.
23

24 **Presiding Officer:** -- eight page brief.

1
2 **CDC:** Yes, sir. And this is the paragraph, as I
3 read it, which provided specific examples of
4 what was in rebuttal to what.

5
6 **Presiding Officer:** All right.

7
8 **CDC:** The first example it seems to me is untenable.
9 The second example, I believe, is equally
10 untenable. So I'm going by what the -- what I
11 assume the government put forth as their best
12 arguments. And on that, sir, I don't think
13 they hold up. Now, to go to your question--is
14 it a tit-for-tat? I don't think so, sir. But
15 at the same time, I do think we have to be
16 attentive to the specific language of the
17 rule, which is where there is substantial
18 undue prejudicial effect to the client, not
19 just inflammatory language, not just something
20 that makes us look bad.

21
22 Because in order to assess what constitutes
23 undue prejudice, sir, we have to take into
24 account what *Fletcher* says we need to take

1 into account, which is the power disparity
2 inherent in any system, which in a
3 prosecution, which is the state, and the
4 accused, who is an individual. And in that
5 context, where here, the state, the
6 government, has had sole custody of my client
7 for three and-a-half years, has had absolute
8 control over his physical body, has had
9 absolute control over to whom he's able to
10 speak, has had absolute control whether he has
11 representation to a lawyer for the first two
12 years he was here, has had absolute control
13 over his knowledge of the outside world.

14
15 In light of all that, sir, it is very hard for
16 me to understand how a statement that he's a
17 fresh-faced teenager in the full blossom of
18 adolescence does damage. Does not just
19 damage, substantial undue prejudicial effect
20 to the United States Government. That, sir, I
21 don't think holds up. And again, that's what
22 I read to be the strongest argument of the
23 government.

1 Now, can we say looking at things globally,
2 looking at things in a totality of the
3 circumstances that if there are statements out
4 there that are either directly or indirectly
5 critical of the government that the government
6 can then respond? Well, sir, that's not what
7 the rule says. And I don't think that we can
8 read into it. Because once we do that, we do
9 away with the rule entirely. This is a rule,
10 3.8, which sets down a marker. It's a flag
11 that says prosecutors are different from
12 defense lawyers. And they're different
13 because in our system of justice, we recognize
14 prosecutors have the advantage.

15
16 There's a quote from a case we put later in
17 the brief that says, "It doesn't take a lot
18 to recognize the disparity between the
19 prosecution and the defense." In that vein,
20 sir, the case law that we have cited in our
21 brief -- and I won't rehearse it here -- makes
22 clear that pretrial publicity means something
23 different to the defense than it does to the
24 prosecution because the prosecution has, at

1 its disposal, the vast resources that the
2 defendant doesn't.

3
4 And I would add, sir, that in this particular
5 context pretrial publicity is not just trying
6 it in the street instead of trying it in the
7 court. It is not that, sir, and the case law,
8 I think, makes that clear. This is an
9 individual, sir, who was not allowed to talk
10 to anybody. Even now, he can't write a letter
11 to the Toronto Star or the New York Times or
12 the Washington Post and say, This is what's
13 going on with me. He's not allowed to do it,
14 both as military counsel and as habeas
15 counsel, sir, I was under specific
16 restrictions. I couldn't say anything,
17 anything at all that Mr. Khadr told me, even
18 if he gave me authorization, pursuant to the
19 ethical rules. I was not allowed to say it
20 until I put that into writing and gave that to
21 a member of the United States Government to
22 screen it. And then I could put it out.

23
24 I give you that example, sir, because it shows

1 that this is not an individual like an accused
2 that we might think of in a typical
3 court-martial or in the United States in
4 criminal court. This is someone who's in
5 specific circumstances --

6
7 **Presiding Officer:** Couldn't in a --

8
9 **CDC:** If I may just finish, sir?

10
11 **Presiding Officer:** Please.

12
13 **CDC:** He's in unique circumstances, historically
14 unique, legally unique as we have found out in
15 the course of the litigation around
16 Guantanamo. It's simply not fair for us to
17 look at pretrial publicity here by the defense
18 and the prosecution and say, well, you're both
19 doing it. Because he hasn't had available to
20 him the opportunity to speak, the opportunity
21 to say anything. He could not even give his
22 name and say, I'm here. He was not allowed to
23 do that. That is unique to what's going on
24 here, sir.

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And I think we have to take cognizance of that when we go back to the language of the rule that says, Is there substantial, undue prejudicial effect to the Government of the United States? That is a contextual decision that has to be made. It has to be made in light of who's got power and who doesn't. And here, sir, I think it's clear who's got power and who doesn't.

Presiding Officer: Let me ask you a question, a couple of questions. First of all, in a criminal trial, it's generally within the discretion or the authority of the presiding judge to issue what's typically called a "gag order" to the parties; correct?

CDC: Yes, sir.

Presiding Officer: And that would bind the -- not only the lawyers, but also the accused in that trial; correct?

1 **CDC:** That's right, sir.

2
3 **Presiding Officer:** So he would be -- in a criminal
4 trial, that defendant in that case would be
5 prohibited from talking to the press releasing
6 information, et cetera; correct?

7
8 **CDC:** That's right, sir. I would only note -- the
9 government themselves note that gag orders are
10 disfavored. And they are particularly
11 disfavored for defendants as opposed to
12 prosecution precisely because of the power
13 disparity of which I've been speaking.

14
15 **Presiding Officer:** And I think also because of a
16 general belief within the American society,
17 the belief in freedom of the press to say what
18 they want to say.

19
20 **CDC:** Absolutely, sir.

21
22 **Presiding Officer:** How does the fact that Mr. Khadr has
23 been held without communication, how would
24 that in any way justify the defense violating

1 the prohibition against inflammatory or
2 prejudicial statements in the press that harm
3 the opposing side in the case?
4

5 **CDC:** Again, sir, I respectfully -- I do not believe
6 that that is the standard.
7

8 **Presiding Officer:** I didn't ask if that was the
9 standard. You seem to be citing to the fact
10 of the unique circumstances as somehow
11 requiring or suggesting a need to apply the
12 rules differently because we're here in
13 Guantanamo Bay, because the accused has been
14 held incommunicado, because he hasn't been
15 able to raise his hand and even state his name
16 that I am here as some kind of justification
17 for applying the rules differently here.
18

19 My question is: How does the fact that he was
20 held incommunicado -- how would the fact --
21 for example, in any other criminal trial if an
22 individual was subject to a gag order, would
23 that justify a defense counsel from violating
24 the prohibition against releasing

1 extrajudicial statements that are inflammatory
2 or prejudicial to the opposing side?

3
4 I think we are in agreement that rule, 3.6,
5 applies equally to the defense and the
6 government.

7
8 **CDC:** No, sir. Respectfully, we are not in
9 agreement.

10
11 **Presiding Officer:** We're not?

12
13 **CDC:** Under the D.C. rules, the comment to 3.8
14 states --

15
16 **Presiding Officer:** I'm not talking about 3.8. I'm
17 talking about 3.6, which prohibits attorneys,
18 attorneys, not prosecutors, not defense
19 counsel, but attorneys, from making
20 extrajudicial comments to the press that are
21 inflammatory or prejudicial.

22
23 **CDC:** Again, sir, I do not believe respectfully that
24 the characterization of the standard as

1 inflammatory or prejudicial is, in fact, the
2 standard in the rules. It's too low. Too low
3 a standard is not the language of the rule.
4 And that allows the government to drive a
5 truck through what can and can't be done.

6
7 Secondly, sir, the reason that 3.8 relates to
8 3.6, as I read from the comment earlier, is
9 that it provides -- it's not just 3.8 that
10 relates to prosecutors. Three point eight is
11 expressing a broader, philosophical concern
12 about the role of prosecutors. And what it
13 states -- and is relevant to D.C., and D.C. is
14 applicable here. What it states is that even
15 with regard to other rules, and the one rule
16 it references is 3.6.

17
18 Even with regard to other rules, the
19 prosecutor may not have available to him or
20 her the full berth of conduct that is
21 available to another lawyer. And the reason
22 that they don't have that full berth of
23 conduct available to them is because they are
24 a prosecutor. What that means, sir, is that I

1 do not agree that 3.6 applies equally with
2 regard to the prosecution and the defense.

3
4 And secondly, as I said, I don't respectfully
5 agree with the characterization of the rule.
6 I think we need to be very careful about the
7 language that we use, because it's too
8 dangerous to just say, Everybody is doing
9 something. The last thing I would say, sir,
10 which I hope is responsive to the call of your
11 question, why does it matter what his
12 conditions are? Why is that relevant to the
13 analysis? Because, sir, I see that as an
14 extension of the rationale for why there's a
15 difference in the application of the ethical
16 rules to the prosecution and the defense in
17 the first place. It's a recognition of the
18 fact that the prosecution and the defense are
19 differently situated. That they are
20 differently situated with respect to
21 resources, but also with respect to the
22 ability to get their story out.

23
24 And let me just say, sir, that the case law

1 that we have cited talks about how if one
2 invokes -- and we don't even know if these are
3 available in this process, but if one invokes
4 one's fifth amendment right and if one invokes
5 one's sixth amendment right, the consequence
6 might be absolute silence by the defendant and
7 that puts the defendant in an unfair situation
8 with respect to the government. That's what
9 the case law says. My argument with regard to
10 his particular situation here at Guantanamo,
11 where he has even less access than a criminal
12 defendant say in a court-martial or in a
13 criminal court in the United States, is just
14 an extension of that. I think it's an
15 extension that is logical. I think it's one
16 that's warranted. I think the only reason
17 that it's not been made is that Guantanamo is
18 historically an anomaly for us. It's not
19 something we have a great deal of experience
20 with. We don't have a record for it, but in
21 light of the situation I think it's
22 appropriate to make that extension of
23 argument.

1 **Presiding Officer:** All right. Thank you.

2
3 **CDC:** I'm sorry. I have one last point I'd like to
4 address with regard to the remedy issue. I
5 can hold it if you'd like me to.

6
7 **Presiding Officer:** How long is it going to take you
8 because we've been on the record for a while
9 and I need to give everybody a break.

10
11 **CDC:** Yes, sir.

12
13 **Presiding Officer:** If you can do it quickly.

14
15 **CDC:** I can. Sir, I just want to respond to an
16 issue that is raised by the government in
17 their brief with regard to remedy. If I read
18 their brief correctly, I believe that they are
19 suggesting -- even if you were to find that
20 there was any kind of inappropriate statement,
21 which required remediation, that the
22 appropriate way to handle that would be to
23 issue instructions to members and then permit
24 voir dire on the matter. I would expect that

1 we would have that opportunity for voir dire
2 any way, so I'm not sure that the adds
3 anything. What you do want to say, however,
4 sir, and I'd like to make reference to a
5 case -- this is something that I did not
6 include because its rebuttal to the
7 government's brief. This is the case of
8 *United States versus Koubriti*,
9 K-O-U-B-R-I-T-I, 305 2D 723. It's from the
10 Federal District Court for the Eastern
11 District of Michigan decided in December of
12 2003.

13
14 And the reason I'm raising this, sir, is that
15 this case involves what were deem to be
16 prejudicial statements made by the Attorney
17 General of the United States outside of the
18 courtroom, extra-judicial statements. And
19 what the court held in this case, and I'm
20 quoting, is that, quote, Although the
21 extensive voir dire revealed no actual
22 prejudice to the defendant's right to a fair
23 trial, the court cannot help but include that
24 an unfounded statement linking an individual

1 of middle eastern origin to the September 11th
2 attacks is a reasonably likely to prejudice
3 this individual's subsequent criminal trial,
4 end quote. This is on page --

5
6 **Presiding Officer:** Are you going the give this to me?

7
8 **CDC:** Yes, sir.

9
10 **Presiding Officer:** Okay. Rather than read it into the
11 record, it would probably be more efficient to
12 allow me to read it.

13
14 **CDC:** Yes, sir. And if I could just conclude by
15 saying that I believe that what this case
16 helps us to see is that just permitting voir
17 dire does not cure what 3.8 is concerned
18 about, which is about reputation and the
19 heightened public condemnation that results
20 from comments such as the one made by the
21 Attorney General here and such is the comments
22 that I believe fall into that rule in the
23 videotape that we saw by the Chief Prosecutor.

1 If I may approach, sir, I have copies of these
2 for the prosecution and for the court.

3
4 **Presiding Officer:** Please. All right, I've been told
5 that the videotape that we watched is going to
6 be marked as RE-62. The case that Mr. Ahmad
7 gave me is marked as RE-63 and I'll go ahead
8 and read it. And I've conferred with counsel
9 briefly. We are going to take a recess at
10 this point. During the recess, we are going
11 to make it for an hour, give everybody a
12 chance to have dinner. We'll come back. I
13 want to go gavel down at 1915.

14
15 The court's in recess.

16
17 *The Commission hearing was called to order at 1813,*
18 *12 January 2006.*

19
20 *The Commission hearing was called to order at 1917,*
21 *12 January 2006.*

22
23 **Presiding Officer:** The hearing will come to order. All
24 those present when we recessed are again

1 present.

2

3 Mr. Ahmad, was there anything else that you
4 wanted to say? And, again, I am not inviting
5 additional comment outside of the brief and
6 what you've already said.

7

8 **CDC:** No, sir, there is not.

9

10 **Presiding Officer:** All right. Lieutenant [REDACTED]

11

12 **APROS:** Yes, sir?

13

14 **Presiding Officer:** And, again, I would remind you of
15 the same parameter that I gave to the defense
16 to confine your arguments to things outside
17 your brief or if there is something that came
18 up during the defense brief if you want to
19 make a comment about that you may.

20

21 **APROS:** Aye, aye, sir.

22

23 In fact, I want to start off exactly where the
24 defense left off with the *Koubriti* case if I

1 may, sir. And together with that the *McVeigh*
2 case. There is a very important fact in both
3 of those cases that is not present here. In
4 both of those cases, which involved immense
5 pretrial publicity. *McVeigh*, of course, the
6 Oklahoma City bombing. These defendants
7 September 11th attacks on terrorism. The
8 defense in those cases came to an agreement
9 immediately in the beginning of the case with
10 the government to have an order put out to
11 limit pretrial publicity. That is not present
12 here. The defense has never come to us and
13 asked us will you agree to an order to limit
14 any kind of pretrial publicity. In fact, for
15 two years at least -- at least a year,
16 possibly two years, the government has sat
17 quietly while the defense has been doing a
18 public relations battle and assault against
19 us. So I think it's important to note you've
20 signed three -- or two protective orders about
21 to sign three and there is not one proposed
22 from the defense asking for a mutual agreement
23 by both parties to limit the rhetoric outside
24 of the courtroom.

1
2 **Presiding Officer:** How long, if you know, has Mr. Ahmad
3 been representing Mr. Khadr?
4

5 **APROS:** I believe he's been representing since the
6 onset of the habeas petition.
7

8 **Presiding Officer:** And when did that start.
9

10 **APROS:** I don't have that date in front of me. But I
11 know -- I'm pretty sure the accused's habeas
12 petition has been -- it's been in court for a
13 substantial time because if I'm not mistaken
14 it's -- a big part of it was decided by the
15 District Court and it's now in front of the
16 District Court of Appeals, so it's got to be
17 over a year.
18

19 **Presiding Officer:** The Khadr case is before the Circuit
20 Court.
21

22 **APROS:** On the habeas petition. His habeas petition
23 is currently before the D.C. Court of Appeals
24 specifically on the issue of the CSRTs and his

1 detention.

2

3 **Presiding Officer:** All right. Continue please.

4

5 **APROS:** I think that's an important fact to consider.

6 And if you look at our Chief Prosecutor's

7 comments. This was the first time that he

8 stood up and decided to say, Hey, I need to

9 say something back to some of these

10 inflammatory remarks. And that's why in my

11 brief if I could refer you back to Page 5,

12 Paragraph 9 that the defense addressed.

13

14 **Presiding Officer:** Of your brief?

15

16 **APROS:** Of my brief. Yes, Your Honor.

17

18 **Presiding Officer:** All right.

19

20 **APROS:** I'd like to say in response to the defense.

21 First I'd like to say thank you for the

22 compliment on the brief. Had I had more time,

23 this would not have been an acceptable product

24 for you. Given the time that I had, I don't

1 want this to be considered the sole and
2 only -- or best argument for the government.
3 It is the best argument I had in the few hours
4 I had to prepare it. So to statements that I
5 use in here and in contrast to what he's
6 addressing in rebuttal is not limited to be
7 the only thing he's possibly rebutting. In
8 fact, his statement where he says, "I would
9 not take someone if I didn't believe they were
10 guilty." Is not just in response to the one
11 statement about "a fresh faced teenager."
12 It's in response also to the accusations that
13 we are part of a shame process, that somehow
14 the government is making up evidence. That
15 somehow the government is in bed with the
16 Presiding Officer and the members and this is
17 all a shame.

18
19 Your Honor, you are not presiding over a
20 kangaroo court. And he was simply making it
21 well known to the public that I've reviewed
22 each and everyone of these cases and I would
23 not bring them before this process unless I
24 believed that I could prove their guilt beyond

1 a reasonable doubt. That's what he's telling
2 the public. That's completely appropriate.
3 It may be a hard blow, but it was not a foul
4 blow. Especially in light of the publicity
5 that we have to respond to now due to the
6 inflammatory remarks from the other side.

7
8 The only other point, Your Honor, I'd like to
9 make is this, being a judge for the time that
10 you have, I'm sure you are aware of the term
11 "An accused is not allowed to use the
12 protections that are supposed to shield him as
13 a sword." These protections in 3.8 and in 3.6
14 are meant to shield him so that he gets a full
15 and fair trial. And so that the government
16 does not do anything to cause extra
17 condemnation upon him than what will happen
18 simply by the charge sheet becoming public.

19
20 He's not allowed to take these rules and now
21 use them as a sword believing that the
22 government has their hands tied behind their
23 back and cannot respond. If you look at the
24 *McVeigh* case, if you look at especially the

1 *Koubriti* case. You'll see that the government
2 especially in the *Koubriti* case broke the
3 deal. They broke the order of the deal
4 between the parties when they made their
5 comments. I would submit to you that if
6 Colonel Davis gave this trial, this press
7 conference a day before yesterday without the
8 defense ever saying anything, I would submit
9 to you he may have very well violated the
10 rules. But in response, he has a client to
11 defend the government and we have a right to
12 represent to its people and the people of the
13 world that we are going to give the accused in
14 an open proceeding a full and fair trial,
15 which he mentioned nine times in that press
16 conference. That was the purpose of it. And
17 I believe when you saw it I hope that you
18 would also see that that's where he was at.

19
20 And a final point, it just came to mind, I
21 want to address, if you feel it's necessary,
22 why I really don't address 3.8 versus 3.6.
23 It's the government's opinion that which is
24 applicable here is whether or not the accused

1 will receive a full and fair trial. That's
2 what we have to look at. A full and fair
3 trial obviously does not mean a trial biased
4 in his favor. It means full and fair for both
5 parties.

6
7 Three point eight talks about prosecution
8 comments designed to put greater public
9 condemnation on the accused. In that respect
10 if all that happens is public condemnation of
11 the accused through comments of a prosecutor
12 and it has absolutely no bearing on a full and
13 fair trial for an accused, that's really not
14 what's relevant here. Because the appropriate
15 remedy there is for the ethics people to take
16 cognizance of it and issue sanctions should
17 that be necessary. What's appropriate here,
18 what's equal for both sides is that it's a
19 full and fair trial. They equally cannot say
20 statements that would prohibit either side
21 from getting a full and fair trial. The
22 standard is not the government can't say
23 anything that may have any tendency to stop a
24 full and fair trial like relevancy, but they

1 have a standard that says they can say
2 anything unless it's beyond a reasonable doubt
3 that it will do that. They are equal
4 standards. The law looks at it equally. Both
5 sides have an equal obligation to do it.
6 Unless you have any other questions, sir...

7
8 **Presiding Officer:** I would ask your opinion,
9 Lieutenant, as to the position of the
10 prosecution as I've been referred to I believe
11 four different jurisdictions ethic code. That
12 governing to naval service, that governing the
13 Air force, the D.C. Bar, and the North
14 Carolina Bar. What, in your opinion, would be
15 the standard if I were to apply one that I
16 would look to. And Mr. Ahmad I'll ask you
17 that same question in a moment, so you get the
18 advantage to think about it.

19
20 **APROS:** If I may in answering that question, I would
21 like to submit to you, it's two pages, another
22 section of the D.C. Bar, which is part of this
23 answer. I've already provided a copy of
24 the -- to the defense before coming in here.

1 And it talks about the scope of the D.C. Bar
2 rules, which I think will answer the question
3 as to the D.C. Bar rules and then I'll address
4 the other rules if I may, sir.

5
6 **Presiding Officer:** Have you seen this, Mr. Ahmad?

7
8 **CDC:** I have. Yes, sir.

9
10 **Presiding Officer:** All right. Bring it up here please.

11
12 *The assistant trial counsel did as directed.*

13
14 **Presiding Officer:** I'm going to take a minute and read
15 this and as I do -- or before I do, I just
16 remind counsel that if you are going to offer
17 something, please have it marked before so we
18 don't waste time doing that here.

19
20 **APROS:** Aye, aye, sir. I'm sorry.

21
22 *Presiding officer perusing exhibit.*

23
24 **Presiding Officer:** All right, I've read RE-64. What's

1 your comment about it?

2

3 **APROS:** Your Honor, I'd like to refer you to the
4 bottom of Page 1, very last line where it
5 starts with moreover to the beginning of Page
6 2, where it reads "moreover nothing in these
7 rules associated comments or this scope
8 section is intended to confer rights on an
9 adversary of a lawyer to enforce the rules in
10 a proceeding other than a disciplinary
11 proceeding." I don't believe these rules
12 apply. I would also say what does apply,
13 first and foremost, always in these
14 proceedings is Commission Law. And you have
15 and order, sir, both from the Secretary of
16 Defense and the President of the United
17 States, make sure the accused receives a full
18 and fair trial. Implicit in that order you
19 being able to take all actions necessary and
20 appropriate to ensure he receives a full and
21 fair trial. So if you took away every rule of
22 ethics out there, you still have the authority
23 just under Commission Law to govern the
24 conduct of counsel before these proceedings to

1 make sure the accused receives a full and fair
2 trial. That's what really applies. That's
3 the standard. And I think judging against
4 that and the actions of counsel is how you
5 should decide this case -- or this issue.
6 Excuse me, sir.

7
8 **Presiding Officer:** All right. Thank you. Mr. Ahmad.

9
10 **CDC:** Sir, if I heard the government correctly, they
11 just wrote out of Commission Law all rules of
12 ethics from any jurisdiction. That's in
13 contradiction -- that directly contradicts
14 Appointing Authority Regulation Number 3,
15 which states that the rules of ethics of the
16 different services as well as the states or
17 jurisdictions in which the attorneys
18 practicing belong are Commission Law in
19 addition to whatever other rules and
20 regulations, MCIs, MCOs, et cetera. So it
21 seems quite clear to me that the rules of D.C.
22 apply. That's what Appointing Authority
23 Regulation 3 says.

1 As to between D.C., North Carolina, so on and
2 so forth, my position, and I think this is
3 well supported, is that these are concurrent
4 bodies of -- these are concurrent regulatory
5 bodies. The most restrictive rule for the
6 prosecution is what would apply. In my
7 reading with the rules that we are talking
8 about, that is D.C. And one would have to go
9 through the analysis for all of them since all
10 of them apply. And as we've discussed they
11 are quite similar. But the differences matter
12 and they are there for a reason between them.
13 But I would submit that D.C. is the one that
14 we should be looking at. It is the one that
15 places the greatest restriction on the
16 prosecution. Given the nature of this motion,
17 I think that's most appropriate.

18
19 **Presiding Officer:** All right. Thank you. It's 1930
20 now. I'd like to go gavel down at 1950 and
21 I'll give you my decision at that time.
22 Court's in recess.

23
24 *The Commission hearing recessed at 1933,*

1 12 January 2006.

2
3 *The Commission hearing was called to order at 2016,*
4 *12 January 2006.*

5
6 **Presiding Officer:** The Commission will come to order.

7 All those present when we recessed are again
8 present.

9
10 Again, I apologize for the delay. I intended
11 to start earlier but it took me a little
12 longer than I anticipated. Also, I want to,
13 again, thank counsel for their briefs and
14 their arguments. They were all, I think, very
15 helpful to me in deciding the issue.

16
17 In deciding the issue before the Commission,
18 I'm going to enter the following findings of
19 facts and conclusions of law:

20
21 1. It is my role to rule on the allegation of
22 prosecutorial misconduct. As such, a
23 violation of an applicable ethical obligation
24 of an attorney practicing before the

1 Commission can constitute prosecutorial
2 misconduct. In addition, it could deny an
3 opponent a full and fair trial before the
4 Tribunal. Under either or both categories,
5 such a violation would authorize me in my role
6 as the Presiding Officer to take steps that I
7 believe are necessary to ensure there is a
8 full and fair hearing as required by the
9 Presidential Order and the implementing
10 Military Commission Order Number 1.

11
12 2. I have reviewed the documents offered as
13 REs-53, 55, 60, 63 and the videotape of the
14 news conference given on 10 January 2006.

15
16 3. I will provide preliminary findings now
17 and rule on the motion and I may attach more
18 detailed findings to the record at a later
19 date.

20
21 4. For this motion the defense carries the
22 burden of persuasion and must establish their
23 case by a preponderance of the evidence.
24

1 5. In making the ruling, I've considered the
2 evidence submitted by both sides, the argument
3 of counsel, and the legal briefs submitted by
4 the parties.

5
6 6. I make the following findings of fact:

7
8 A. On 10 January 2006, Colonel Morris
9 Davis, United States Air Force was the Chief
10 Prosecutor for the Office of Military
11 Commission.

12
13 B. On 10 January 2006, Colonel Davis was
14 authorized by the Appointing Authority to
15 speak with the press concerning cases pending
16 before military Commissions.

17
18 C. On 10 January 2006, Colonel Davis
19 participated in a press conference attended by
20 reporters representing many news organizations.

21
22 D. At the above news conference Colonel
23 Davis made a number of statements, many
24 contained in the REs, mentioned above, as well

1 as the videotape or rather the videotape of
2 the press conference that were widely reported
3 in the news media.
4

5 E. Some of Colonel Davis' statements
6 specifically addressed the case of *U.S. v*
7 *Khadr*, while others addressed the issues of
8 *U.S. v al Bahlul* and military Commissions in
9 general.
10

11 F. Many of Colonel Davis' comments
12 extended beyond that normally heard from a
13 military prosecutor.
14

15 G. Mr. Ahmad represents Mr. Khadr.
16 Having been detailed to this case on 28
17 November 200[5] and making a formal appearance
18 on 22 December 200[5].
19

20 H. Mr. Ahmad has made several statements
21 to the press prior to 10 January 2006 in which
22 he made negative characterizations of the U.S.
23 Government's actions in this case -- rather in
24 the case of *U. S. v Khadr* specifically, and

1 negative characterizations of the Commission
2 process generally. In addition, he has made
3 statements that attribute unlawful and
4 unprofessional conduct to the prosecutor's
5 office.

6
7 I. On 1 December 2005, I sent initial
8 instructions to all appointed members
9 instructing them not to read or listen to any
10 accounts of the Commission and not to discuss
11 the Commission with anyone.

12
13 J. On 20 December 2005, Colonel Davis,
14 Mr. Ahmad and Captain Merriam were informed of
15 and provided a copy of my initial instructions
16 to the members.

17
18 7. Conclusions of Law:

19
20 A. To prevail on this motion, the
21 defense must show that Colonel Davis made an
22 extra-judicial statement which serves to
23 heighten condemnation of the accused or had a
24 substantial likelihood of materially

1 prejudicing an adjudicative proceeding and
2 were not in response to a defense allegation
3 of unlawful or unprofessional conduct by the
4 prosecutor's office or that the attorney
5 reasonably believed they were required to
6 protect a client from a substantial undue
7 prejudicial effect of recent publicity not
8 initiated by the prosecutor.

9
10 B. While Colonel Davis' statements were
11 extrajudicial, and are potentially harmful to
12 a criminal proceeding, they also appear to be
13 intended and necessary to respond to a defense
14 allegation of unlawful or unprofessional
15 conduct by the Prosecutor's Office and to
16 protect the U.S. Government and the Military
17 Commission from the substantial undue
18 prejudice effect -- prejudicial effect of
19 recent publicity initiated by persons or
20 entities other than the U.S. Government or the
21 Military Commissions.

22
23 C. Having reviewed the evidence and in
24 view of the findings of fact, I find the

1 defense has not met their burden of
2 establishing by a preponderance of the
3 evidence that Colonel Davis' statements
4 violated his ethical obligations.

5
6 D. In applying the ethics codes of all
7 four jurisdictions cited by the defense, the
8 outcome remains the same.

9
10 E. Alternatively, to establish
11 prosecutorial misconduct, the defense would
12 prevail by showing that Colonel Davis' actions
13 denied the accused or will deny the accused
14 fair and full trial before the Commission.

15
16 Having reviewed the evidence and considering
17 the findings as set forth above, in particular
18 in light of the initial instructions sent to
19 all of the members, I find the defense has
20 failed to establish by a preponderance of the
21 evidence that Colonel Davis' actions will deny
22 the accused a full and fair trial.

23
24 Accordingly, the defense motion is denied.

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16

Is there anything else either side desires to
take up before we adjourn for the evening?

PROS: No, sir.

DC: No, sir.

Presiding Officer: If there is nothing further, the
proceeding will be in recess.

*The Commission hearing recessed at 2023,
12 January 2006.*

[END OF PAGE]

**AUTHENTICATION OF
FINAL SESSION TRANSCRIPT**

in the case of:

United States v. Omar Ahmed Khadr
a/k/a/ Akhbar Farhad
a/k/a Akhbar Farnad

This is to certify that the Pages 1 through 231 are an accurate and verbatim transcript of the proceedings held in the above styled case on January 11 and 12, 2006.



Robert S. Chester
Colonel, USMC

16 February 2006
DATE